Supreme Court, U.S.
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No. 95-714

In The

Supreme Court of the United States

October Term, 1995

NATIONWIDE MUTUAL INSURANCE COMPANY and NATIONWIDE MUTUAL FIRE INSURANCE COMPANY,

Petitioners,

v.

HENRY CISNEROS, Secretary of the United States Department of Housing & Urban Development; JERALD L. STEED, Executive Director, Dayton Human Relations Council; CHARLES W. BROWN, Chairperson, Dayton Human Relations Council; and CITY OF DAYTON,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Fair Housing Act ("the Act"), 42 U.S.C. § 3601, *et seq.*, regulates the provision of property insurance despite the absence of any reference to insurance in either the Act's language or legislative history, the repeated refusal by Congress to amend the Act to expressly include insurance, the inverse state preemption backdrop of the McCarran-Ferguson Act, 15 U.S.C. § 1011, *et seq.*, and Congress' enactment, in the same year as the Act, of another statute – the Urban Property Protection and Reinsurance Act ("UPPRA"), 12 U.S.C. § 1749bbb, *et seq.* – to specifically address the problem of property insurance availability.

2. Whether the interpretive regulations of the United States Department of Housing & Urban Development ("HUD"), which construe the Fair Housing Act to cover the business of insurance, are entitled to substantial deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), notwithstanding that a contrary Congressional intent can be ascertained "through traditional tools of statutory construction" (Judge Kennedy dissenting below, 52 F.3d at 1364; App. 29).

3. Whether the ripeness doctrine precludes pre-enforcement judicial review of a question that has an immediate and direct effect on the day-to-day business of property insurance: the legitimacy of HUD's definitive pronouncement that it will engage in the disparate impact regulation of property insurance under the Fair Housing Act.

4. Whether the Court of Appeals correctly concluded "that the presence of additional remedies in the Fair Housing Act does not cause the Act to invalidate, impair or supersede [state] insurance law" (52 F.3d at 1363; App. 27) in contravention of the McCarran-Ferguson Act.

PARTIES TO THE PROCEEDING AND RULE 29.6 LIST

All parties to the proceeding below are reflected in the case caption. Petitioners have no parent companies or nonwholly owned subsidiaries to list pursuant to Supreme Court Rule 29.6.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Nationwide Mutual Insurance Company and Nationwide Mutual Fire Insurance Company (collectively "Nationwide") respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on May 1, 1995.

OPINIONS BELOW

The divided opinion of the Court of Appeals is reported at 52 F.3d 1351. App. 1-29.[1] The District Court's memorandum and order adopting the Magistrate Judge's Report and Recommendations is not reported. App. 85-92. The Magistrate Judge's Report and Recommendations is also unreported. App. 30-79.

JURISDICTION

The judgment of the Court of Appeals was entered on May 1, 1995. App. 29a. A timely petition for rehearing was denied, Judge Kennedy dissenting, on August 4, 1995. App. 94-95. This petition is filed within ninety (90) days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

[1] References to the Appendix filed with this Petition will be abbreviated as "App." followed by the page numbers. References to the Joint Appendix filed with the Court of Appeals will be abbreviated as "JA" followed by the page number.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant provisions of the Fair Housing Act, 42 U.S.C. § 3601, *et seq.*, the McCarran-Ferguson Act, 15 U.S.C. § 1011, *et seq.*, the Urban Property Protection and Reinsurance Act, 12 U.S.C. § 1749 bbb, *et seq.*, the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02, the Ohio Insurance Code, O.R.C. § 3901.01, *et seq.*, and the regulations issued by HUD, 24 C.F.R. § 100.70(d)(4), are set forth in the Appendix. App. 96-107.

STATEMENT OF THE CASE

Nationwide provides property insurance to many thousands of customers throughout the United States. JA 82-83. Respondent HUD[2] administers the Fair Housing Act, enacted in 1968, which prohibits "discriminatory practices of property owners, real estate brokers, builders and home financers." *Mackey v. Nationwide Insurance Companies*, 724 F.2d 419, 423 (4th Cir. 1984), citing Senator Mondale, the Act's sponsor, at Cong. Rec. S. 2272-2284 (daily ed. Feb. 6, 1968). There is no reference in either the text of the Act or in its legislative history to insurance. *Id.* at 424. Since 1968, as dissenting Judge Kennedy noted below, "repeated attempts to amend the Fair Housing Act to expressly include insurance practices have failed,

[2] Respondents Jerald Steed and Charles Brown are the Executive Director and Chairperson, respectively, of the Dayton, Ohio Human Relations Council (the "DHRC"), an agency of the Respondent City of Dayton which assists HUD in the local administration of Fair Housing Act complaints. App. 3.

although the Act has been amended to prohibit other discriminatory activities." 52 F.3d at 1364; App. 29, citing 42 U.S.C. § 3605 (*e.g.*, adding discrimination by appraisers). Nevertheless, in 1989, HUD issued regulations that interpreted the "otherwise make unavailable or deny" prohibition of Section 3604(a) of the Act to encompass the discriminatory provision of property insurance. 24 C.F.R. § 100.70(d)(4). When administrative complaints of alleged discriminatory insurance practices were subsequently filed against Nationwide, pursuant to that regulation, HUD and the DHRC asserted jurisdiction and commenced extensive discovery. App. 4-5. Nationwide then filed this action seeking declaratory and injunctive relief on the ground that Respondents lacked authority under the Act to regulate insurance. Jurisdiction in the District Court was predicated upon 28 U.S.C. § 1331, the Declaratory Judgment Act and the Administrative Procedure Act, 5 U.S.C. §§ 701-06. App. 31; JA 82.

The Magistrate Judge who initially heard the matter concluded, contrary to HUD's motion to dismiss, that, based on *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), this case was ripe for review. His Report and Recommendations found that "the issues presented . . . are purely legal and fit for judicial resolution"; that HUD's regulation constituted "a final agency action"; and that because that regulation directly affected Nationwide's primary business – its "daily decisions whether to insure and at what rate to insure" – there was "sufficient hardship [to Nationwide] to make the issues ripe for pre-enforcement review." App. 37, 41. Having surmounted the ripeness procedural barrier, the Magistrate Judge then recommended that Respondents'

summary judgment motion be granted and that Nationwide's summary judgment motion be denied. App. 79. Nationwide objected to the Magistrate Judge's recommendations on the merits. HUD did not object to his recommended denial of its motion to dismiss. The District Court adopted the Magistrate Judge's recommendations in their entirety. App. 92.

Nationwide appealed. HUD did not cross-appeal. A divided Court of Appeals affirmed. *Nationwide Mutual Ins. Co. v. Cisneros*, 52 F.3d 1351 (6th Cir. 1995); App. 1-29. The majority initially concluded, over the dissent of Judge Kennedy, that *Mackey*, which had concluded that the Fair Housing Act did not regulate insurance, was wrong in its three major premises: (1) HUD's construction of the Act did not, as the Fourth Circuit had held (724 F.2d at 423), render other statutory language "superfluous"; (2) silence in the Act and its legislative history, even when considered in light of the "insistent position of Congress that regulation of the insurance industry be left to the states," and the concurrent enactment in 1968 of UPPRA which adopted a "very different" approach to the problem of unavailable property insurance, did not "strongly indicate," as *Mackey* opined (*id.* at 423-24), that Congress intended to exclude any regulation by the Act of insurance practices; and (3) subsequent unsuccessful attempts to extend the Act to encompass insurance, did not, as *Mackey* had concluded (*id.* at 424), demonstrate an intent to preclude application of the Act to the business of insurance. 52 F.3d at 1356-59; App. 10-15. Instead, relying on *NAACP v. American Family Mut. Ins. Co.*, 978 F.2d 287 (7th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 2335 (1993), the Court of Appeals concluded that "HUD's

interpretation of the Fair Housing Act is reasonable" and entitled to substantial deference under *Chevron*. 52 F.3d at 1359-60; App. 17.

The court next turned to Nationwide's argument that the McCarran-Ferguson Act preempts the regulation of insurance under the Fair Housing Act. The court conceded that, as a result of the McCarran Act, "the Fair Housing Act . . . cannot be construed in such a way as to invalidate, impair or supersede any state law enacted to regulate the business of insurance." *Id.* at 1361; App. 20. Nonetheless, the court never reached Nationwide's argument that disparate impact enforcement of the Fair Housing Act – the finding of a violation based upon its effect on a protected group regardless of intent – would have precisely that result. The court held, *sua sponte*, that this issue was not ripe for review because it failed to meet the ripeness criteria set forth in *Abbott Laboratories*. *Id.* at 1361-63; App. 22-26. The Court of Appeals did address and reject Nationwide's disparate treatment (intentional discrimination) McCarran Act argument. Relying again primarily upon *American Family*, the court concluded that "the presence of additional remedies in the Fair Housing Act does not cause the Act to invalidate, impair or supersede Ohio insurance law." *Id.* at 1363; App. 27.

Nationwide filed a petition for rehearing and suggestion of rehearing *en banc* with respect to the Court of Appeals' determination that Nationwide's disparate impact McCarran-Ferguson Act preemption argument was not ripe for review. After requesting and receiving a brief from HUD, the Court of Appeals denied Nationwide's petition, Judge Kennedy again dissenting, in an order entered on August 4, 1995. App. 94-95.

REASONS FOR GRANTING THE WRIT

This case presents an appropriate vehicle for the Court to resolve one or more important unsettled, recurrent questions: *first*, whether, as the court below and the Seventh Circuit have held, contrary to the Fourth Circuit and the dissenting opinion of Judge Kennedy, the Fair Housing Act applies to the business of insurance; *second*, whether *Chevron* requires heightened deference to interpretive agency regulations that admittedly do not involve "technical determinations requiring agency expertise" (52 F.3d at 1360; App. 18) but which, instead, concern only "pure questions of statutory construction" (*INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987)); *third*, whether disparate impact enforcement of the Fair Housing Act, with its day-to-day impact on the underwriting decisions of property insurers throughout the United States, is a question ripe for review under *Abbott Laboratories*; and, *finally*, whether Fair Housing Act insurance regulation would "invalidate, impair or supersede" state insurance law in contravention of the McCarran-Ferguson Act.

A. This Court Should Resolve The Conflict Among The Courts Of Appeal Over Whether The Fair Housing Act Applies To The Business Of Insurance

Continuing uncertainty as to whether HUD and its approximately 85 "substantially equivalent" local agencies,[3] such as the DHRC, may regulate insurance practices

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[3] Vol. XI, No. 10 Fair Housing-Fair Lending Bulletin, Aspen Law & Business, p. 4 (Oct. 1, 1995).

is a matter of substantial national importance to the property insurance industry, homeowners and prospective homeowners, state insurance commissions, and numerous civil rights organizations. As an independent federal agency, the Federal Mediation and Conciliation Service ("FMCS"), recently concluded, "[s]everal courts have dealt with the issue, but there has been no definitive ruling to date. The most recent case, *Nationwide Mutual Insurance Co. v. Cisneros* (6th Cir., 1995) may be appealed and may give greater guidance on the jurisdiction question."[4] FMCS is right. Guidance from this Court is needed.

1. There are in excess of one thousand insurance companies in the United States which offer property insurance. More than 96% of homeowners purchase some form of property or fire insurance.[5] Homeowners pay nearly thirty billion dollars annually in premiums for homeowners and/or fire insurance policies.[6] Each day thousands of underwriting decisions involving those policies have to be made. Those determinations, such as

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[4] Convening Report for Regulatory Negotiations on Possible Regulatory Negotiations for Insurance and Fair Housing Act ("the Report"), July 21, 1995, p. 5. App. 120-134. The Report was prepared by the FMCS, at HUD's request, to evaluate the feasibility of utilizing negotiated rulemaking to develop a proposed rule applying the Fair Housing Act to property insurance. The Report concluded, after study and interview of more than twenty-five organizational representatives, that negotiated rulemaking would not be appropriate.

[5] Insurance Information Institute, *The Fact Book*, p. 14 (1993).

[6] A.M. Best's Annual Aggregates & Averages, *Property-Casualty*, p. 100 (1995 ed.).

what risks to insure and what rate to apply, constitute the core component of the business of insurance. *See, e.g., Barnett Bank of Marion County v. Gallagher*, 43 F.3d 631, 634-36 (11th Cir.), *cert. granted*, ___ U.S. ___, 132 L.Ed.2d 920 (Sept. 27, 1995) (No. 94-1837). As the uncontroverted record in this case demonstrates, application of the Fair Housing Act would significantly affect these underwriting practices. Risks will then be insured that otherwise would be declined – for instance, properties that involve neutral environmental hazards (*e.g.*, exposure to adjacent properties with a high risk of burning, lack of proximity to fire protection facilities or historical loss experience for similar properties) will be insured where declining the risk could have a disparate impact upon a protected group. This increased assumption of risks by insurers will concomitantly increase the rates of all of their insureds. Better risks will then drop out of the insurance pool as they are forced to subsidize higher risk properties. The result will be increased underwriting losses and eventual insurance company insolvency.[7] This significant federal intrusion into the traditional state-regulated classification of insurance risks cannot be justified

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[7] This scenario is not simply unfounded speculation. The likelihood of its occurrence was demonstrated in uncontroverted affidavits submitted by Nationwide to the District Court from Professor Spencer Kimball, a nationally recognized authority in the field of insurance regulation, Richard Stewart, a former Superintendent of Insurance for the State of New York, Ellen Leslie, Vice President/Operations for the Ohio FAIR Plan Underwriting Association, and Robert White, Nationwide's Vice President Personal Lines Insurance Services. JA 300-312, 340-349, 384-390 and 394-397.

absent a clear Congressional intent – an intent which *Mackey*, in conflict with the decision below, found absent.

2. As the Court of Appeals noted, since at least 1978, "HUD has interpreted the Fair Housing Act as prohibiting discriminatory practices relating to property and hazard insurance." 52 F.3d at 1354; App. 3. Its legal authority to assert that jurisdiction remains, however, as the Director of Research, National Association of Insurance Commissioners, recently stated, "disputed by insurers, many insurance regulators, and many members of Congress."[8] This "continuous debate"[9] intensified after *American Family* upheld the applicability of the Fair Housing Act to a claim alleging intentional discrimination in the provision of property insurance. It was exacerbated further when more and more courts applied a disparate impact approach to other Fair Housing Act provisions.[10] Even the existence of insurance "redlining,"

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[8] Klein, *Urban Homeowners Insurance Markets: Problems and Possible Solutions*, Aug. 11, 1995, p. 5, n. 2, which also noted that the National Association of Insurance Commissioners "has not yet taken a formal position on this question."

[9] Report, *supra*, n. 4, at p. 5. App. 127.

[10] *See Arthur v. City of Toledo*, 782 F.2d 565, 575 (6th Cir. 1986) (upholding disparate impact analysis of Fair Housing Act claims); *U.S. v. City of Parma*, 661 F.2d 562, 575-76 (6th Cir. 1981), *cert. denied*, 456 U.S. 926 (1982); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 934 (2d Cir.), *aff'd*, 488 U.S. 15 (1988); *Halet v. Wend Inv. Co.*, 672 F.2d 1305, 1311 (9th Cir. 1982); *Resident Advisory Board v. Rizzo*, 564 F.2d 126, 146-48 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978). Fair Housing Act disparate impact analysis has been applied in recent years to a variety of protected groups, not just racial minorities. *See, e.g., A.R.F.A.P.S. v. Regulations and Permits Admin.*, 740 F. Supp. 95 (D.

the basis for Fair Housing Act insurance discrimination complaints, is controversial. The Association of Community Organizations for Reform Now ("ACORN") and the National Fair Housing Alliance, supported by a variety of civil rights organizations,[11] contend that insurance "redlining" practices are widespread.[12] Insurance industry studies fail to support that conclusion.[13] Insurance departments in Illinois, Missouri, Minnesota and other states have joined the debate with recent studies of their

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Puerto Rico 1990) (denial of special use permit disparately impacted "handicapped" AIDS patients); *United States v. Schuylkill Township*, 1991 U.S. Dist. LEXIS 2 (E.D. Pa. 1991) (zoning ordinance restricting "community living arrangements" had disparate impact on mentally handicapped); *Potomac Group Home Corp. v. Montgomery County*, 823 F. Supp. 1285 (D. Md. 1993) (zoning requirement disparately impacted group home for disabled elderly persons); *United States v. Badgett*, 976 F.2d 1176 (8th Cir. 1992) (facially neutral landlord's policy has a disparate impact on families).

[11] According to a September 11, 1995 press release by the Alliance, p. 3, its lobbying efforts before Congress to address insurance discrimination under the Fair Housing Act were joined by the Leadership Conference on Civil Rights, the NAACP, NAACP-Legal Defense and Educational Fund, the National Puerto Rican Coalition, the National Council of La Raza, People for the American Way, Center for Community Change, the ACLU and other "supporting organizations." App. 112.

[12] ACORN, 1993, *A Policy of Discrimination?: Homeowners Insurance Redlining in 14 Cities*.

[13] American Insurance Association, 1993, *Availability and Use of Homeowners Insurance in the Urban Core of Major American Cities*.

own.[14] At least twenty-eight administrative complaints alleging insurance discrimination have been filed with HUD,[15] including complaints brought by the National Fair Housing Alliance challenging the underwriting practices of three major property insurers – Allstate, State Farm and Nationwide.[16] HUD recently awarded grants of over two million dollars to private groups to encourage them to initiate similar enforcement actions.[17]

3. Application of the Fair Housing Act to insurance also has been the subject of controversy within the executive and legislative branches. In response to an Executive Order signed on January 17, 1994, HUD last year announced its intention to issue new regulations on the subject of property insurance. *See* Fed. Reg., Vol. 59, No. 157, pp. 41995-41996. HUD then held a series of public meetings across the United States attended by numerous

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[14] *See, e.g.*, Illinois Department of Insurance, 1994, *Status of Homeowners Insurance in Illinois*; Missouri Department of Insurance, 1993, *Homeowners Insurance in Missouri*; Minnesota Department of Commerce, 1994, *Homeowners Insurance: An Investigation Into Possible Illegal Discrimination*.

[15] Press Release of the National Fair Housing Alliance, *supra* n. 11, at p. 3. App. 112.

[16] *E.g.*, Case No. 03-94-0529-8, filed May 11, 1994, at HUD's Regional Office in Philadelphia, PA.

[17] Press Release of the National Association of Independent Insurers, an organization representing approximately 570 property and casualty insurers, Sept. 11, 1995, p. 1 (App. 114), relying on an April 28, 1995 letter to Hon. Rick Lazro, Chairman of the House Subcommittee on Housing and Community Opportunity, from Respondent Cisneros.

community organizations, insurance industry representatives, state regulators and other interested parties. More than $435,000 was spent by HUD in contract services to assist the agency in the proposed rulemaking.[18] Upon the conclusion of the public meetings, however, HUD decided against additional rulemaking in this area.[19] Congress also has been unable to take action on this divisive issue. In 1994, a bill was introduced in the Senate to require property insurers to report underwriting activities by zip code. S. 1917, 103rd Cong., 2nd Sess. (1994), the Anti-Redlining in Insurance Disclosure Act of 1994. The Senate held hearings in May 1994, but the bill never made it to a vote. By contrast, more recently, an appropriations bill which passed the House contained a provision withdrawing all HUD funding for the regulation of property insurance. H.R. 2099, 104th Cong., 1st Sess. (1995). That provision, however, was deleted last month from the Senate's version of the House bill. *Id.* Congress' failure to act reflects the deep political divisions over the insurance "redlining" issue which has taken on racially charged overtones. *Moseley-Braun Gets GOP to Spare Fair Housing Rule*, Chicago Sun-Times, Sept. 28, 1995, at 22 (Senator Moseley-Braun, according to an aide, stated that,

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[18] *Id.*

[19] Letter from HUD Acting Deputy Assistant Secretary Elizabeth K. Julian to John Lobert, Senior Vice President of the National Association of Independent Insurers, August 17, 1995. Julian concluded that HUD's "Office of Fair Housing and Equal Opportunity intends . . . to await further development of the law applying the Fair Housing Act to property insurance and to use future court decisions to evaluate the need for rulemaking." App. 117.

if the House funding prohibition was not withdrawn, "[w]e'll be riding on the back of the bus again.").

The disagreement over whether the Fair Housing Act regulates insurance has caused a critical dislocation in the administration of an important area of federal policy. If HUD is correct in its construction of the Act to cover insurance, its enforcement efforts should not be thwarted by threshold litigation over its jurisdiction. If HUD is incorrect, it should cease expending its limited funds in defiance of Congressional intent and leave property insurance regulation to the states. "[T]he field of insurance," after all, "has long been recognized as a proper subject for extensive state regulation because of its critical role in the protection of local personal and property interests." *Silver v. Garcia*, 760 F.2d 33, 36 (1st Cir. 1985). The ongoing partisan debate over whether dual federal-state or exclusive state regulation is appropriate needs to be terminated. It has become far too costly both emotionally and economically for too many parties. Review by this Court to resolve the conflict among the circuits is, therefore, warranted.

B. This Court Should Resolve The Confusion In The Lower Courts Over The Proper Application Of *Chevron*

This case also is illustrative of the confusion that exists in the lower courts as to the correct interpretation of *Chevron*. The Court of Appeals majority held that *Chevron* deference was required even though the issue addressed by HUD's regulation – whether the "otherwise make unavailable or deny" language of Section 3604(a) of

the Fair Housing Act encompasses the discriminatory refusal "to provide . . . property or hazard insurance" (24 C.F.R. § 100.70(d)(4))[20] – does not involve an agency's application of legal standards "to a particular set of facts" but, instead, raises a "pure question of statutory construction" that is "well within the province of the judiciary." *Cardoza-Fonseca*, 480 U.S. at 446, 448.[21] Dissenting Judge Kennedy reached an opposite conclusion. In her opinion, because the court could "ascertain Congressional intent through traditional tools of statutory construction, deference to . . . [HUD's] interpretation is

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[20] Although HUD's regulation also purports to be based upon Section 3604(b) of the Act (see the opinion below, 52 F.3d at 1356; App. 7-8), HUD and the lower courts have relied primarily upon Section 3604(a). The reason is evident. Section 3604(b) does not apply to the provision of property insurance. *See Mackey*, 724 F.2d at 424 (the provision of services under Section 3604(b) "encompasses such things as garbage collection and other services of the kind usually provided by municipalities . . . what the [hazard insurance] industry does cannot reasonably be described as the provision of services in connection with dwellings") and *Clifton Terrace Associates, Ltd. v. United Technologies Corp.*, 929 F.2d 714, 720 (D.C. Cir. 1991) (§ 3604(b) is "directed at those who provide housing and then discriminate in the provision of attendant services or facilities, or those who otherwise control the provision of housing services and facilities").

[21] *See*, to the same effect, *NLRB v. United Food and Commercial Workers Union*, 484 U.S. 112, 123 (1987) ("On a pure question of statutory construction, our first job is to try to determine congressional intent, using 'traditional tools of statutory construction.' ") and *International Union, U.A.W. v. Brock*, 816 F.2d 761, 765 (D.C. Cir. 1987) (court refused to defer to the agency's interpretation of the term "employment" found in the Trade Act which the court characterized as a "pure question of statutory construction").

unnecessary." 52 F.3d at 1356; App. 29. There is, as this divided decision reflects, an undesirable tension between *Chevron* and *Cardoza-Fonseca*. This "Court itself has engaged in a serious debate as to whether *Chevron* deference applies at all to a 'pure question of statutory construction.' " *Johnson City Medical Center v. U.S.*, 999 F.2d 973, 981 (6th Cir. 1993) (Batchelder, J., dissenting). *See also* Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2084 (1990) ("since *Chevron* itself, the general principle of deference has been invoked on numerous occasions and produced considerable controversy . . . the Supreme Court has rejected a number of agency interpretations of law even in the aftermath of *Chevron*").

Resolution of the proper application of *Chevron* is particularly apropos where, as here, an agency seeks to expand its own jurisdiction. As this Court has observed, "[a]lthough agency determinations within the scope of delegated authority are entitled to deference, it is fundamental 'that an agency may not bootstrap itself into an area in which it has no jurisdiction.' " *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990) citing *Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973). *See also* Sunstein, *supra*, 90 COLUM. L. REV. at 2099 ("Congress would be unlikely to want agencies to have the authority to decide the extent of their own powers. To accord such powers to agencies would be to allow them to be judges of their own cause, in which they are of course susceptible to bias."). The question of *Chevron*'s application to agency jurisdictional interpretations, however, has been subject to varying approaches in the appellate courts. "Some circuit court decisions have granted deference to an agency's jurisdictional interpretation while others

have stated that deference is not appropriate. Some circuits have vacillated on the question while others have acknowledged the issue as unresolved by the Court and have explicitly reserved the question." Comment, Chevron *Deference To Agency Interpretations That Delimit The Scope of the Agency's Jurisdiction*, 61 U. CHI. L. REV. 957, 965 (1994) (footnotes omitted). This case presents the Court with a desirable opportunity to delineate the proper interpretation of *Chevron*.

C. The Court Of Appeals' Refusal To Address Nationwide's Argument That Disparate Impact Enforcement Of The Fair Housing Act Is Preempted By The McCarran-Ferguson Act Conflicts With This Court's Decision In *Abbott Laboratories* And Other Circuit Court Precedent

The Court of Appeals concluded that the question of whether a "disparate impact approach to insurers" (52 F.3d at 1361; App. 21) contravenes the McCarran-Ferguson Act was not ripe for review. That decision misconstrues *Abbott Laboratories* and disregards the opinion of other Circuits.

In *Abbott Laboratories*, this Court reversed a lower court opinion that there was no jurisdiction to review a challenge to agency regulations that imposed new drug labeling requirements. That issue was fit for judicial review, the Court reasoned, because the regulations constituted "final agency action," *i.e.*, they were neither "informal [n]or tentative," and the regulations had "a direct effect on [the plaintiffs'] day-to-day business," *i.e.*,

they confronted the plaintiffs with the dilemma of incurring the costs of changing their current labeling practices or "follow their present course and risk prosecution." 387 U.S. at 151-52. That decision was followed by the District of Columbia Circuit's opinions in *Chamber of Commerce v. Reich*, 57 F.3d 1099, 1101 (D.C. Cir. 1995) ("[T]he [Executive] Order confronts employers with the difficult choice between surrendering their right to hire permanent replacements and risking the loss of current and future government contracts.") and *Ciba-Geigy Corp. v. U.S. EPA*, 801 F.2d 430, 438-39 (D.C. Cir. 1986) ("The Company's only alternative to costly compliance with [the agency's] regulatory directive would be to run the risk of serious civil and criminal penalties [for its violation]."). *See also Franklin Federal Savings Bank v. Director, Office of Thrift Supervision*, 927 F.2d 1332, 1336 (6th Cir.), *cert. denied*, 502 U.S. 937 (1991).

Here, as the Magistrate Judge recognized (App. 37-41), the situation is no different. Nationwide is similarly challenging agency action that is neither "informal" nor "tentative." HUD has stated definitively its intent to enforce the Fair Housing Act under a disparate impact approach and to apply that approach to complaints against property insurers.[22] These pronouncements have

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[22] HUD's Assistant Secretary, in a December 17, 1993 memorandum to all HUD Regional Directors which is still in effect, advised that Fair Housing Act cases should be analyzed "using a disparate impact analysis." App. 135. HUD has subsequently repeated that unequivocal view. At Congressional hearings on the subject of insurance discrimination, HUD's Assistant Secretary testified that "[t]he standards to determine discrimination in [insurance] – as in all other covered areas – will be based on

been reiterated by HUD in other cases[23] and, when it did not seek review of the Magistrate Judge's denial of its motion to dismiss, even implicitly in this case. The HUD regulation at issue is not limited, nor has it ever been interpreted as being limited, to only disparate treatment cases. As in *Abbott Laboratories* and the other decisions cited above, there has been final agency action. And, no less than in *Abbott Laboratories* and the other cases cited above, Nationwide cannot, as the Court of Appeals suggested (52 F.3d at 1363; App. 26), simply wait until the administrative process eventually concludes. Nationwide faces the "very real" dilemma (*Abbott Laboratories*, 387 U.S. at 153) of either complying with HUD's regulation at

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the principles of overt discrimination, disparate treatment, and *disparate impact*." Statement Before the Senate Banking Committee, Hearing on Insurance Discrimination, May 11, 1994; App. 139 (emphasis added). HUD reiterated that position in a notice of proposed rulemaking for property insurance discrimination. Fed. Reg., Vol. 59, No. 157, 41996 ("The standards for determining discrimination in this area are those utilized in all other areas covered by the Act.") And, at a public meeting on discrimination in property insurance, HUD's Assistant Secretary stated that it was not debatable whether "disparate impact . . . [is] cognizable under the federal Fair Housing Act . . . [I]t is not a question. That question has been answered definitively by virtually every court of competent jurisdiction that has entertained the question." App. 141.

[23] *See, e.g.*, HUD's brief to the Tenth Circuit in *Mountain Side Mobile Estates v. Secretary, HUD*, 56 F.3d 1243 (10th Cir. 1995), pp. 16-25 (contending that a disparate impact analysis applies generally to complaints under the Act and "is a reasonable construction of the Act that is supported by the statutory language, the overwhelming weight of the caselaw, the legislative history and the public policy interests underlying the Act"). App. 144.

substantial cost (and at the risk of violating state insurance laws requiring "fair discrimination") or running the risk of future prosecution by HUD and the imposition of substantial penalties. *See Chamber of Commerce*, 57 F.3d at 1101 (the "choice between taking immediate action to [plaintiff's] detriment and risking substantial penalties for non-compliance presents a paradigm case of 'hardship' ") and *Ciba-Geigy*, 801 F.2d at 439 n. 11 (plaintiff need not await a specific enforcement proceeding where the agency has put plaintiff to the " 'hard choice between compliance certain to be disadvantageous and a high probability of strong sanctions' ") (citation omitted).

The refusal to review Nationwide's disparate impact challenge has pernicious, far-reaching consequences. Judicial review, providing an "authoritative interpretation of statutory language," would "enhance rather than undermine the statutory scheme." *Franklin Federal*, 927 F.2d at 1338. Additionally, as the Magistrate Judge below observed, "[i]f HUD is correct, not only Nationwide, but all insurers who provide homeowner's coverage must alter any standards inconsistent with HUD's policies." App. 41. A decision by this Court is necessary to clarify the application of ripeness jurisprudence and obviate the enormous expense that insurers will otherwise face in altering their underwriting standards to address the litigation concerns created by the specter of disparate impact suits.

D. The Court Of Appeals' Rejection Of McCarran-Ferguson Act Preemption Is Contrary To The Plain Language Of The Statute And Prior Precedent Of This Court

The Court of Appeals held that, while Nationwide's challenge to HUD's regulation under a disparate treatment approach was ripe for review, "the McCarran-Ferguson Act does not preclude HUD's interpretation of the Fair Housing Act." 52 F.3d at 1363; App. 27. The court rejected Nationwide's arguments that " 'the availability of private civil actions under the Fair Housing Act, with access to jury trials and unlimited punitive damages, will impair or supersede Ohio insurance law which does not afford such remedies' " and that "the availability of private civil remedies under the Fair Housing Act would allow a claimant to bypass the administrative procedures outlined in the Ohio Insurance Code." *Id.* The Court of Appeals' opinion is at odds with the language of Section 2(b) of the McCarran-Ferguson Act as well as the underlying Congressional "desire to reserve to the States the regulation of the 'business of insurance.' " *FMC Corp. v. Holliday*, 498 U.S. 52, 63 (1990). The crux of the lower court's reasoning, following *American Family*, is that the existence of additional federal remedies does not "invalidate, impair or supersede" state law where there is no direct conflict between the substantive provisions of the state and federal law. 52 F.3d at 1363; App. 27. The "inverse preemption" (*American Family*, 978 F.2d at 293) required by the McCarran-Ferguson Act, however, occurs even if the federal statute "duplicates" the state proscriptions where that "duplication" causes the state regulation of insurance to be "impaired" or "superseded." It was for

this reason that the court in *Ambrose v. Blue Cross & Blue Shield of Virginia*, 891 F. Supp. 1153, 1164-68 (E.D. Va. 1995), recently declined to follow *Nationwide* and *American Family* when it concluded that the additional federal remedies permitted under RICO results in the impairment of state insurance law under the McCarran-Ferguson Act. *See also, Wexco, Inc. v. IMC, Inc.*, 820 F. Supp. 194, 204 (M.D. Pa. 1993) (availability of federal RICO remedies "cannot help but upset the balance of relationships between insurance entities and insureds which are established and regulated by [state law]").

The question of whether additional duplicative federal remedies contravene the McCarran Act, and its corollary inquiry into the appropriate role of federal and state authority in regulating insurance, presents a recurrent matter of substantial importance. For over 50 years, since the enactment of the McCarran Act, insurers have assumed that Congress intended the states to play the primary role in the regulation of insurance. State insurance departments are typically staffed by professionals who are experts in the insurance field and knowledgeable about the workings of the insurance market. JA 387. The federal remedies permitted by the court below, including jury trials, punitive damages and disparate impact suits, will inevitably displace those state regulators – regulators who are closer to the issues in their respective states and in the best position to reconcile competing state interests in both insurer solvency and fair access to insurance products. JA 388-389. The McCarran Act preemption issue, accordingly, also compels review by this Court. The Court, it should be noted, has recently granted review in

another McCarran Act case. *Barnett Bank of Marion County v. Gallagher, supra.*

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Dated: November 1, 1995

Respectfully submitted,

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No. 94-3296

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

NATIONWIDE MUTUAL INSURANCE COMPANY and NATIONWIDE MUTUAL FIRE INSURANCE COMPANY, *Plaintiffs-Appellants,* *v.* HENRY CISNEROS, Secretary of the United States Department of Housing & Urban Development; JERALD L. STEED, Executive Director, Dayton Human Relations Council; CHARLES W. BROWN, Chairperson, Dayton Human Relations Council; and CITY OF DAYTON, *Defendants-Appellees.*	)	ON APPEAL from the United States District Court for the Southern District of Ohio

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Decided and Filed May 1, 1995

Before: KENNEDY and MILBURN, Circuit Judges; WISEMAN,* District Judge.

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* The Honorable Thomas A. Wiseman, Jr., United States District Judge for the Middle District of Tennessee, sitting by designation.

MILBURN, J., delivered the opinion of the court, in which WISEMAN, D.J., joined. KENNEDY, J. (p. 25), delivered a separate dissenting opinion.

MILBURN, Circuit Judge. Plaintiffs Nationwide Mutual Insurance Company and Nationwide Mutual Fire Insurance Company appeal the district court's grant of summary judgment to defendants Henry Cisneros, Secretary of the United States Department of Housing and Urban Development; Jerald L. Steed and Charles W. Brown, Executive Director and Chairperson, respectively, of the Dayton, Ohio Human Relations Council; and the City of Dayton, Ohio, in this action for declaratory judgment and injunctive relief in which plaintiffs challenged defendants' authority to regulate the issuance and cancellation of homeowner's insurance policies under the Fair Housing Act. On appeal, the issues are (1) whether the district court erred in finding that the Fair Housing Act governs the business of property insurance, (2) whether the district court erred in finding that the McCarran-Ferguson Act does not preempt the regulation of the business of insurance under the Fair Housing Act, and (3) whether the district court erred in dismissing plaintiffs' state law claims. For the reasons that follow, we affirm.

I.

A.

Plaintiffs Nationwide Mutual Insurance Company and Nationwide Mutual Fire Insurance Company (collectively "Nationwide"), Ohio corporations, seek declaratory and injunctive relief from attempts by the

Department of Housing and Urban Development ("HUD") to regulate plaintiffs' property insurance underwriting practices under the Fair Housing Act ("the Act"), 42 U.S.C. § 3601, *et seq.* The insurance underwriting practices in question involve "redlining," in which the insurer charges higher rates or declines to write insurance for people who live in particular areas. Defendant HUD is responsible for the administration of the Fair Housing Act. Plaintiffs also seek declaratory and injunctive relief from attempts by defendants Jerald L. Steed, Charles Brown, and the City of Dayton ("the Dayton defendants") to regulate plaintiffs' property insurance underwriting practices under Ohio state law and Dayton municipal law. As earlier stated, Jerald L. Steed and Charles Brown are the Executive Director and the Chairperson, respectively, of the Dayton Human Relations Council ("DHRC"). In addition to enforcing fair housing provisions of Dayton ordinances, DHRC also assists HUD in the local administration of housing discrimination complaints under the Fair Housing Act.

Under the Fair Housing Act, HUD is responsible for receiving and investigating charges of discrimination in housing. Because mortgage lenders require borrowers to obtain and maintain property and hazard insurance on mortgaged property as a condition of obtaining a loan, HUD has interpreted the Fair Housing Act as prohibiting discriminatory practices relating to property and hazard insurance. HUD has adhered to this interpretation of the Act since at least 1978, when HUD's General Counsel

wrote in a memorandum to the Assistant Secretary for Equal Opportunity:

> Adequate insurance coverage is often a prerequisite to obtaining financing. Insurance redlining, by denying or impeding coverage makes mortgage money unavailable, rendering dwellings "unavailable" as effectively as the denial of financial assistance on other grounds[.]

Memorandum to the Assistant Secretary for Equal Opportunity, dated August 25, 1978 (quoted in defendant HUD's brief at 10). Furthermore, in 1988, the Fair Housing Act was amended to authorize HUD to issue rules to implement the Act. 42 U.S.C. § 3614a. At that time, HUD issued a regulation reflecting its interpretation of the Act and its application to insurance companies. This regulation defined "other prohibited sale and rental conduct" to include:

> Refusing to provide municipal services or property or hazard insurance for dwellings or providing such services or insurance differently because of race, color, religion, sex, handicap, familial status, or national origin.

24 C.F.R. § 100.70(d)(4).

In May 1990, HUD received a complaint from Steven and Jennifer Beavers alleging that Nationwide had cancelled their homeowner's insurance because of their race and/or place of residence. HUD referred this complaint to the DHRC, which determined that it was "probable" that Nationwide had violated the City of Dayton's fair housing ordinances. In addition, on September 28, 1990, Sarah Wilson filed a housing discrimination complaint with HUD, alleging that Nationwide had refused,

because of her sex, race, and the racial make-up of the area, to reinstate her insurance policy on a residential building that was located in a predominantly black area of Toledo, Ohio. HUD and the DHRC were in the process of investigating these complaints when Nationwide filed this action. Both investigations have been held in abeyance pending the conclusion of this case.

B.

Plaintiffs commenced this action for declaratory and injunctive relief on May 6, 1991, in the United States District Court for the District of Columbia. Plaintiffs named as defendants Jack Kemp, then Secretary of HUD; Jerald L. Steed and the Reverend Charles Brown, the Executive Director and Chairperson, respectively, of the Dayton Human Relations Committee; and the City of Dayton, Ohio. The Dayton defendants moved for a change of venue, and on December 13, 1991, pursuant to 28 U.S.C. 1404(a), the action was transferred to the United States District Court for the Southern District of Ohio.

In May 1992, defendants moved to dismiss plaintiffs' complaint on jurisdictional grounds. Thereafter, on December 1, 1992, plaintiffs moved for summary judgment. The Dayton defendants and HUD filed cross-motions for summary judgment on January 14 and 15, 1993, respectively. On September 27, 1993, the magistrate judge issued his Report and Recommendation in which he concluded that the issues presented in the case were ripe for review and thus recommended that the district court deny HUD's motion to dismiss. In addition, the magistrate judge recommended that the district court

grant defendants' cross-motions for summary judgment and deny plaintiffs' motion for summary judgment upon concluding (1) that HUD's interpretation of the Fair Housing Act was entitled to judicial deference; (2) that, in any event, it was a correct interpretation of the Fair Housing Act; and (3) that the regulation was not barred by the McCarran-Ferguson Act. Finally, the magistrate judge granted HUD's motion for a protective order barring certain discovery and recommended that the district court decline to exercise jurisdiction over plaintiffs' state law claims.

Plaintiffs filed timely objections to the magistrate judge's report and recommendation. On February 24, 1994, the district court adopted the magistrate judge's report and recommendation and dismissed this action. This timely appeal followed.

II.

A.

Plaintiffs argue that the district court erred in granting defendants' cross-motions for summary judgment and denying their motion for summary judgment.[1] We review a district court's grant of a motion for summary judgment de novo. *Michigan Protection & Advocacy Serv.,*

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[1] Plaintiffs also argue in a footnote in their brief that the magistrate judge abused his discretion in granting HUD's motion for a protective order. However, plaintiffs failed to object to this ruling before the district court and thus have not preserved this issue for appeal. *United States v. Walters*, 638 F.2d 947, 949-50 (6th Cir. 1981).

Inc. v. Babin, 18 F.3d 337, 341 (6th Cir. 1994). "This court will affirm the district court's order only if we determine that the pleadings, affidavits, and other submissions show 'that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' " *Babin*, 18 F.3d at 341 (quoting Federal Rule of Civil Procedure ("Fed. R. Civ. P.") 56(c)). All evidence must be viewed in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). However, "[t]he moving party need not support its motion with evidence disproving the non-moving party's claim, but need only show that 'there is an absence of evidence to support the non-moving party's case.' " *Babin*, 18 F.3d at 341 (quoting *Celotex Corp v. Catrett*, 477 U.S. 317, 325 (1986)).

Plaintiffs argue that the district court erred in finding that defendants have delegated authority, under the Fair Housing Act, or under "substantially equivalent" local ordinances, to regulate plaintiffs' property insurance underwriting practices. Specifically, plaintiffs assert that the plain language, structure, and legislative history of § 3604(a) and (b) of the Fair Housing Act preclude this finding. Section 3604(a) and (b) of the Fair Housing Act state that it shall be unlawful:

> (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, *or otherwise make unavailable or deny*, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.
>
> (b) To discriminate against any person in the terms, conditions, or privileges of sale or rental

> of a dwelling, or *in the provision of services* or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.

42 U.S.C. § 3604(a) and (b) (emphasis added). HUD has interpreted these provisions of the Fair Housing Act to prohibit "[r]efusing to provide . . . property or hazard insurance for dwellings or providing such . . . insurance differently because of race . . . " 24 C.F.R. § 100.70(d)(4). Plaintiffs argue that HUD, in promulgating this regulation, has exceeded the authority delegated to it by Congress under the Fair Housing Act, and therefore the Dayton defendants lack the authority to investigate claims of discriminatory insurance underwriting practices. The district court rejected plaintiffs' argument and adopted the reasoning of the magistrate judge in his report and recommendation, which concluded that HUD had "not exceeded its statutory authority in enacting its regulations because the interpretation of the Fair Housing Act embodied in that regulation is one to which judicial deference is to be accorded under [*Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)]. Furthermore, even in the absence of *Chevron* deference, HUD's interpretation of the Fair Housing Act is correct." J.A. 178.

We are confronted with two questions when we review an agency's construction of a statute. In *Lansing Dairy, Inc. v. Espy*, 39 F.3d 1339 (6th Cir. 1994), we stated:

> First and foremost is the question whether Congress has directly spoken to the matter at hand. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). "If the

> intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. If, however, the court decides that Congress has not directly addressed the precise question at issue, the court may not simply impose its own construction of the statute. *Id.* at 843. "Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.*

Lansing Dairy, 39 F.3d at 1349-50 (parallel citations omitted). In *Chevron*, the Court also stated that in determining whether an agency's answer is based on a permissible construction of a statute, a reviewing "court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Chevron*, 467 U.S. at 843 n. 11. However, the Court also noted that "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Chevron*, 467 U.S. at 843 n. 9. Thus, we must first determine whether the text of the Fair Housing Act addresses the precise issue in this case, i.e., whether § 3604(a) and/or (b) govern the issuance and cancellation of property insurance policies.

In *N.A.A.C.P. v. American Family Mut. Ins. Co.*, 978 F.2d 287 (7th Cir. 1992), *cert. denied*, 113 S.Ct. 2335 (1993),

the Seventh Circuit held that Congressional intent regarding the application of § 3604 of the Fair Housing Act to insurance practices is unclear:

> The Fair Housing Act does not define key terms such as "service" and "make unavailable". [sic] By writing its statute in the passive voice – banning an outcome while not saying *who* the actor is, or *how* such actors bring about the forbidden consequence – Congress created ambiguity.

American Family, 978 F.2d at 298 (emphasis in original).

On the other hand, plaintiffs argue that the plain language and structure of § 3604(a) preclude its application to insurance providers. Specifically, plaintiffs rely on the canons of statutory interpretation of "ejusdem generis" and "expressio unius est exclusio alterius" in support of their contention that insurance underwriting practices are not governed by the Fair Housing Act. First, plaintiffs argue that HUD's interpretation of § 3604 conflicts with the principle of "ejusdem generis," which states that where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words. *See Otis Elevator Co. v. Secretary of Labor*, 921 F.2d 1285, 1289 (D.C. Cir. 1990). Thus, plaintiffs argue that in § 3604(a), because the general phrase "otherwise make unavailable or deny" follows the specific examples of failure "to sell or rent" or refusal "to negotiate for the sale or rental" of a dwelling, the phrase "otherwise make unavailable or deny" does not include any activities that do not directly affect the

availability of a dwelling. We disagree. Plaintiffs' argument that the phrase "otherwise make unavailable or deny" must only include activities that directly affect the availability of a dwelling does not clarify Congressional intent as to whether the availability of property insurance falls within this category. Therefore, we conclude that the canon of "ejusdem generis" does not preclude HUD's interpretation of § 3604(a).

Second, plaintiffs argue that the maxim "expressio unius est exclusio alterius," which states that the mention of one thing implies exclusion of another, also precludes HUD's interpretation of § 3604. Specifically, plaintiffs note that § 3604(b) proscribes discrimination in the "terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith," and that § 3605 bars discrimination in mortgage financing. Therefore, plaintiffs assert that the fact that the statute proscribes some conduct that indirectly affects housing, i.e., services and mortgage financing, suggests that property insurance is not covered by the Act. Relying on the Fourth Circuit's decision in *Mackey v. Nationwide Ins. Cos.*, 724 F.2d 419 (4th Cir. 1984), plaintiffs argue that this result is necessary to avoid rendering §§ 3604(b) and 3605 of the Act superfluous. In *Mackey*, the Fourth Circuit concluded § 3605 shows that § 3604 must be read narrowly. "If § 804 [§ 3604] was designed to reach every discriminatory act that might conceivably affect the availability of housing, § 805's [§ 3605] specific prohibition of discrimination in the provision of financing would have been superfluous." *Mackey*, 724 F.2d at 423. The Seventh Circuit rejected this

argument in *American Family*, holding that §§ 3604 and 3605 overlap and that

> [c]onveying meaning to diverse interpreters for an uncertain future is a difficult business. A wise drafter may state a principle in one section and list some applications of that principle in another, to make pellucid what ought to be apparent but which some judges (and many lay persons) will miss unless spelled out. Using the instance to restrict the principle would gum up the process of communication, inverting every effort to clarify.

American Family, 978 F.2d at 298.

We agree with the conclusion in *American Family* that §§ 3604 and 3605 overlap and are not mutually exclusive. We note that many courts have applied § 3604 to a number of parties and practices not mentioned in §§ 3604(b) and 3605. *See United States v. City of Parma*, 661 F.2d 562 (6th Cir. 1981) (imposition of building height limitations), *cert. denied*, 456 U.S. 926 (1982); *Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977) (issuance of zoning permits), *cert. denied*, 434 U.S. 1025 (1978); *Kennedy Park Homes Ass'n, Inc. v. City of Lackawanna*, 436 F.2d 108 (2d Cir. 1970) (rezoning property plaintiff picked for low-income housing project and denying sewer hook-ups), *cert. denied*, 401 U.S. 1010 (1971). Furthermore, plaintiffs' argument seems confused. Plaintiffs assert that the phrase "otherwise makes unavailable or denies" is "a catch-all for other activities which, like selling or renting, directly affect the availability of a dwelling. The fact that Congress did not expressly identify each of those other activities does not

render § 3604(a) 'vague.' " Plaintiffs' Brief at 15. This argument seems to contradict plaintiffs' argument that by listing proscribed behavior in § 3604(b) and 3605, Congress intended for all other activity affecting the availability of housing to be outside the gambit of the Fair Housing Act. Therefore, we conclude that the principle of "expressio unius est exclusio alterius" does not preclude HUD's interpretation of the Act.

Plaintiffs further argue that the legislative history of the Fair Housing Act reflects the Congressional intent that the Fair Housing Act not govern insurance underwriting practices. Relying on *Mackey*, plaintiffs argue that although Congress did not directly address the Act's application to insurance practices, it is implausible that Congress intended the Fair Housing Act to reach insurance practices in light of the fact that (1) Congress enacted the Urban Property Protection and Reinsurance Act of 1968 ("UPPRA"), *see* 12 U.S.C. § 1749bbb, *et seq.*, in the same year it enacted the Fair Housing Act, and (2) subsequent attempts to amend the Fair Housing Act to expressly prohibit discrimination in insurance have failed.

Plaintiffs assert that "[t]he fact that hazard insurance was not mentioned in the [Fair Housing Act] or its legislative history strongly indicates that [Congress did not intend to proscribe discrimination in hazard insurance]." *Mackey*, 724 F.2d at 423. Plaintiffs note that Congress enacted UPPRA in 1968, the same year the Fair Housing Act was enacted, to handle the problem of the unavailability of hazard insurance in some urban areas. However, in *Dunn v. Midwestern Indem. Mid-American Fire & Casualty Co.*, 472 F. Supp. 1106, 1111 (S.D.Ohio 1979),

the court found that the purposes of the Fair Housing Act and UPPRA were different. The court noted that UPPRA "was enacted to protect private insurance companies from the risk of catastrophic losses which resulted from riots or civil disorders[,]" but did not "expressly address the issue of discriminatory insurance redlining based on race." *Dunn*, 472 F. Supp. at 1111. We agree that the purposes of the two acts are different and that the enactment of UPPRA does not shed light on Congress' intent regarding the application of the Fair Housing Act to insurance underwriting practices. In *American Family*, the Seventh Circuit noted:

> Silence in the legislative history could imply that Members of Congress did not anticipate that the law would apply to insurers. Silence equally could imply that the debate was about the principle of nondiscrimination, leaving details to the future. The backwards phraseology of § 3604 suggests the latter possibility.

American Family, 978 F.2d at 299. Therefore, we conclude that the legislative history of the Fair Housing Act does not preclude HUD's interpretation of the Act.

Next, plaintiffs argue that the failure of subsequent attempts by Congress to amend the Fair Housing Act to expressly prohibit discrimination in insurance supports their contention that Congress did not intend for the Act to govern insurance underwriting practices. Plaintiffs stress that attempts to amend the Act failed after the Fourth Circuit's decision in *Mackey*, which squarely rejected the proposition that §§ 3604(a) or (b) implicitly encompassed the regulation of insurance. However, in *American Family*, the Seventh Circuit held that *Mackey's*

conclusion that unsuccessful attempts to amend the Fair Housing Act to explicitly address discriminatory insurance practices reflected Congress' disapproval of this reading was unwarranted. *American Family*, 978 F.2d at 299. The Seventh Circuit explained:

> Proposed legislation can fail for many reasons. Some Members of Congress may oppose the proposal on the merits; others may think it unnecessary and therefore not worth the political capital needed to write the "clarification" into the statute over opposition; still others may be indifferent, or seek to use the bill as a vehicle for some unrelated change. Congress may run out of time, as a noncontroversial bill sits in a queue while a contentious proposal is debated. No surprise, therefore, that the Supreme Court repeatedly reminds us that unsuccessful proposals to amend a law, in the years following its passage, carry no significance.

Id. See also McDiarmid v. Economy Fire & Casualty Co., 604 F. Supp. 105, 107-08 (S.D.Ohio 1984); *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990).

Thus, we conclude that subsequent failed attempts to amend the Fair Housing Act are not helpful in determining the intent of the Congress that enacted the Act. Furthermore, Congress gave HUD the authority to promulgate regulations knowing that HUD had consistently interpreted the Act as governing insurance underwriting practices. *American Family*, 978 F.2d at 300. Therefore, we conclude that plaintiffs have failed to show any evidence of Congressional intent to preclude the application of the Fair Housing Act to insurance underwriting practices.

We next turn to the second question under a *Chevron* analysis – whether the agency's interpretation of the Fair Housing Act is reasonable.[2] Under *Chevron*, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. "However, this deference does have its limits. Courts may invalidate agency adjudication or rulemaking which is 'inconsistent with the statutory mandate or that frustrate[s] the policy that Congress sought to implement.' " *Lansing Dairy*, 39 F.3d at 1350 (quoting *Federal Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981)). "Similarly, where the court determines that, given the intention of Congress to achieve some goal, ' "there are compelling reasons that [the agency interpretation] is wrong," ' "the court may invalidate the agency's action." *Id.* (quoting

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[2] Plaintiffs argue that *Chevron* is irrelevant to a dispute involving a pure question of statutory construction. Plaintiffs rely on *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987) and *NLRB v. United Food and Commercial Workers Union, Local 23*, 484 U.S. 112 (1987). However, plaintiffs' reliance on these cases is misplaced. These cases explain that "on a pure question of statutory construction" a court should not defer to an agency's interpretation of a statute if " 'using traditional tools of statutory construction' " a court can determine congressional intent. *NLRB*, 484 U.S. at 123 (quoting *Cardoza-Fonseca*, 480 U.S. at 446-48). However, if the statute is ambiguous, then " 'the question for the court is whether the agency's answer is based on a permissible construction of the statute.' " *NLRB*, 484 U.S. at 123 (quoting *Chevron*, 467 U.S. at 843). Therefore, because we conclude that the Fair Housing Act is ambiguous regarding its application to insurance underwriting practices, we only determine whether HUD's interpretation of the Act is permissible.

Boettger v. Bowen, 923 F.2d 1183, 1186 (6th Cir. 1991) (quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969)).

In *American Family*, the court found that "Section 3604 is sufficiently pliable that its text can bear the Secretary's construction [interpreting § 3604 as prohibiting insurance redlining]." *American Family*, 978 F.2d at 300. We agree. The purpose of the Fair Housing Act as a whole is "to eliminate the discriminatory business practices which might prevent a person economically able to do so from purchasing a house regardless of his race." *Dunn*, 472 F. Supp. at 1109. Moreover, "[t]he language of the Act is broad and inclusive." *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209 (1972); *See Babin*, 18 F.3d at 344 ("Congress intended § 3604 to reach a broad range of activities that have the effect of denying housing opportunities to a member of a protected class."). Thus, we conclude that HUD's interpretation of the Fair Housing Act is reasonable in light of the direct connection of availability of property insurance and ability to purchase a house. *See Dunn*, 472 F. Supp. at 1109; *American Family*, 978 F.2d at 298, 300-01.

Plaintiffs argue, however, that the "[d]enial of property insurance, even if discriminatory, is simply not akin to denying or making unavailable a dwelling." Plaintiffs' Brief at 13. Therefore, plaintiffs argue that the provision of insurance is too attenuated to the availability of housing for insurance providers to be governed by the Fair Housing Act. Plaintiffs rely on *Babin*, in which we addressed the question of the extent to which "the phrase 'otherwise make unavailable' reaches out to make unlawful actions that are removed from the central event of

purchasing or leasing a dwelling but nonetheless have some effect on a person's ability to acquire housing" in interpreting a similar provision of the Fair Housing Act that prohibits discrimination on the basis of a person's handicap. *Babin*, 18 F.3d at 344. In *Babin*, the plaintiffs alleged that neighbors who bought a house to prevent its use as a group home for mentally handicapped adults violated the Fair Housing Act by making housing "unavailable" to a protected class of people. In holding that the Fair Housing Act could not be read so broadly so as to encompass "normal economic competition," we refused to interpret the Act to prohibit "any action that results in the unavailability of housing for protected classes." *Babin*, 18 F.3d at 344-45. However, in *Babin*, we also acknowledged that the phrase "otherwise make unavailable" might extend to "other actors who, though not owners or agents, are in a position directly to deny a member of a protected group housing rights." *Id.* at 344.

Babin is distinguishable from the present case. Unlike *Babin*, the availability of property insurance has a direct and immediate affect on a person's ability to obtain housing. *See American Family*, 978 F.2d at 298, 300-01; *Dunn*, 472 F. Supp. at 1109. Accordingly, we conclude that HUD's interpretation of the Fair Housing Act is consistent with goals of the Fair Housing Act and a reasonable interpretation of the statute.

Plaintiffs argue that the district court erred in applying *Chevron* to this case. Specifically, plaintiffs assert that *Chevron* is limited to agency regulations that address technical determinations requiring agency expertise. In support of this contention, plaintiffs rely on *Bowen v. American Hospital Ass'n*, 476 U.S. 610 (1986). However, the

regulation at issue in *Bowen* was promulgated under the authority of a general delegation of power to any agency head, "regardless of his agency's mission or expertise" to issue regulations to implement the Rehabilitation Act. *Bowen*, 476 U.S. at 642. Under these circumstances, the Court found that there was "not the same basis for deference predicated on expertise as we found [in *Chevron*] . . . " *Id.* at 642 n. 30. In this case, however, we are faced with the reasonableness of HUD's interpretation of the Fair Housing Act, which it administers. We agree with the district court's holding that *Chevron* provides no indication that its holding is to be limited to its facts. *See Chevron*, 467 U.S. at 865-66 (holding that it is "entirely appropriate" for an agency to "resolv[e] the competing interests which Congress itself either inadvertently did not resolve or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities"). Thus, we conclude that *Chevron* analysis was appropriate in this case and that the district court did not err in finding that insurance underwriting practices are governed by the Fair Housing Act.

B.

Plaintiffs argue that district court erred in finding that the McCarran-Ferguson Act does not preempt the regulation of insurance underwriting practices under the Fair Housing Act. The McCarran-Ferguson Act, 15 U.S.C. § 1012(b), provides in relevant part:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by

> any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance[.]

The primary purpose of the McCarran-Ferguson Act was to ensure to the states the continued ability to regulate and to tax the business of insurance. *McDiarmid*, 604 F. Supp. at 108. In *American Family*, the Seventh Circuit explained that "[t]he McCarran-Ferguson Act establishes a form of inverse preemption, letting state law prevail over general federal rules – those that do not 'specifically relate[ ] to the business of insurance." *American Family*, 978 F.2d at 295. Thus, because the Fair Housing Act does not mention insurance, it is covered by the McCarran-Ferguson Act and cannot be construed in such a way as to invalidate, impair, or supersede any state law enacted to regulate the business of insurance.

Plaintiffs argue that HUD's interpretation of the Fair Housing Act conflicts with Ohio insurance law. Specifically, plaintiffs assert that Ohio law prohibits insurers from "[m]aking or permitting any unfair discrimination between individuals of the same class" involving "essentially the same hazard in the amount of premium, policy fees, or rates charged." Ohio Rev.Code, § 3901.21(M). Thus, plaintiffs argue that "insurers may not charge different rates for risks of the same hazard or charge the same rate for risks of different hazards." Plaintiffs' Brief at 30. Plaintiffs assert that "the threat of disparate impact suits under the Act, *which require no proof of discriminatory intent*, [together with the availability of federal jury trials] impairs neutral risk discernment in violation of the 'fair discrimination' principle." Plaintiffs' Brief at 31 (emphasis in original).

Plaintiffs also argue that HUD's interpretation of the Fair Housing Act impairs the Ohio FAIR Plan, which was enacted, pursuant to UPPRA, to make property insurance available to individuals unable to obtain insurance in the private market because of the location of their property. Plaintiffs argue that if HUD applies a disparate impact approach to the Fair Housing Act, then this application would impair or supersede the Plan's allocation of the risk of loss due to environmental hazards and would interfere with the private insurance market which the Plan intentionally left alone. In their reply brief, plaintiffs concede that they do not argue that the FAIR Plan authorizes discrimination on the basis of race or any other impermissible factor. Plaintiffs' Reply Brief at 14. Thus, plaintiffs' argument hinges on HUD's hypothetical application of a disparate impact approach to insurers.

Defendant HUD responds that plaintiffs may not challenge the validity of the HUD's regulation interpreting the Fair Housing Act on the ground that HUD might apply some form of disparate impact analysis to them in the future. In other words, HUD argues that because it has never applied a disparate impact approach to insurance providers, this issue is not ripe for review. We note that in his report and recommendation, the magistrate judge concluded that plaintiffs' action was ripe and that HUD did not object to the magistrate judge's report and recommendation. Generally, the failure to object to a magistrate's report and recommendation precludes appellate review of an issue. *United States v. Walters*, 638 F.2d 947, 949-50 (6th Cir. 1981). However, we have held that "this general rule is subject to the familiar exception that parties can neither waive objections nor consent to

subject matter jurisdiction." *United Liberty Life Ins. Co. v. Ryan*, 985 F.2d 1320, 1325 (6th Cir. 1993). We review a district court's finding of subject matter jurisdiction de novo. *Greater Detroit Resource Recovery Authority v. United States EPA*, 916 F.2d 317, 319 (6th Cir. 1990). Furthermore, we have held that " 'every federal appellate court has a special obligation to "satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review".' " *Id.* (quoting *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986) (quoting *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934)); *see Bigelow v. Michigan Dep't of Natural Resources*, 970 F.2d 154, 157 (6th Cir. 1992) (" 'Ripeness is more than a mere procedural question; it is determinative of jurisdiction. If a claim is unripe, federal courts lack subject matter jurisdiction and the complaint must be dismissed. This deficiency may be raised sua sponte if not raised by the parties.' ") (quoting *Southern Pac. Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 502 (9th Cir. 1990), *cert. denied*, 502 U.S. 943 (1991) (citation omitted)). Therefore, we will sua sponte consider for jurisdictional purposes HUD's claim that the application of its regulation under a disparate impact approach was not ripe for review.

The Supreme Court has outlined the ripeness doctrine in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), and two companion cases, *Toilet Goods Association, Inc. v. Gardner*, 387 U.S. 158 (1967) and *Gardner v. Toilet Goods Association, Inc.*, 387 U.S. 167 (1967). In those cases, the Court explained as follows:

> The injunctive and declarative judgment remedies are discretionary, and courts traditionally have been reluctant to apply them to

> administrative determinations unless these arise in the context of a controversy "ripe" for judicial resolution. Without undertaking to survey the intricacies of the ripeness doctrine it is fair to say that its basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.

Abbott Laboratories, 387 U.S. at 148-49. The Court also explained that the ripeness requirement involves a two-part test: "The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* at 148. "In order to be ripe for review, a dispute must satisfy both prongs of the ripeness test." *Franklin Federal Savings Bank v. Director, Office of Thrift Supervision*, 927 F.2d 1332, 1336 (6th Cir. 1991).

Thus, we must first determine whether HUD's application of its regulation under a disparate impact analysis is fit for judicial decision. The Supreme Court set forth several factors to consider when analyzing whether issues are appropriate for judicial resolution in *Abbott Laboratories*. In this regard, the Court considered whether the regulations at issue constituted "final agency action." *Abbott Laboratories*, 387 U.S. at 149. The Court explained that the "cases dealing with judicial review of administrative

actions have interpreted the 'finality' requirement in a pragmatic way." *Id.* Furthermore, we have explained:

> As a general rule, final agency action includes "interpretive decisions that crystalize or modify private legal rights." *Federal Trade Commission v. Standard Oil of California*, 449 U.S. 232, 247 (1980) (Stevens, J., concurring). The D.C. Circuit has explained the purpose of the finality requirement as being to determine "if the agency's position is merely tentative or, on the other hand, whether the agency views its deliberative process as sufficiently final to demand compliance with its announced position." *Ciba-Geigy Corp. v. U.S. Environmental Protection Agency*, 801 F.2d 430, 436 (D.C. Cir. 1986). While an agency may generally express tentative views without judicial review, "[o]nce the agency publicly articulates an unequivocal position, however, and expects regulated entities to alter their primary conduct to conform to that position, the agency has voluntarily relinquished the benefit of proposed judicial review." *Ibid.*

Franklin Federal, 927 F.2d at 1337.

In this case, the district court concluded that plaintiffs' action for declaratory and injunctive relief was ripe because HUD's regulation was a final agency action. However, the district court did not distinguish between plaintiffs' challenge to HUD's regulation under a disparate treatment approach, which requires a showing of intentional discrimination, and plaintiffs' challenge under a disparate impact approach, which requires no showing of discriminatory intent. In this case, plaintiffs seek to challenge HUD's regulation by arguing that *if* HUD were to apply a disparate impact analysis under the Act, then

insurers could not rely only on neutral environmental risk considerations in their underwriting practices. HUD has never applied a disparate impact analysis to insurers. Plaintiffs rely on the possibility that HUD might so apply its regulation in the future. We note that "[m]ere contemplation of a course of action does not constitute a final agency action." *First Federal Sav. Bank and Trust v. Ryan*, 927 F.2d 1345, 1354 (6th Cir.), *cert. denied*, 502 U.S. 864 (1991). Moreover, we note that plaintiffs argue that in the event that HUD applies a disparate impact analysis to insurers, the Act will forbid consideration of neutral underwriting criteria where those criteria have a discriminatory effect. On the other hand, HUD argues that any application of the disparate impact analysis would depend on the practices alleged to violate the Act and the business necessity put forth to justify them. Thus, we conclude that the issue of HUD's application of a disparate impact analysis to insurers to show a violation of the Fair Housing Act is not sufficiently final.

Furthermore, we do not find that withholding judicial review would constitute an undue hardship upon the parties. In *Toilet Goods*, the Supreme Court addressed a regulation that provided that the Commissioner of Food and Drugs could suspend certification of any manufacturer upon finding that the manufacturer had refused to permit inspectors adequate access to manufacturing facilities. *Toilet Goods*, 387 U.S. at 161. The Court concluded that the regulation was not ripe for review, noting:

> The regulation serves notice only that the Commissioner *may* under certain circumstances order inspection of certain facilities and data, and that further certification of additives *may* be

> refused to those who decline to permit a duly authorized inspection until they have complied in that regard. At this juncture we have no idea whether or when such an inspection will be ordered and what reasons the Commissioner will give to justify his order.

Toilet Goods, 387 U.S. at 163 (emphasis in original). Similarly, in this case, it is not clear that HUD will apply a disparate impact analysis to its regulation governing insurance providers in the future, and it is not clear what considerations would violate this analysis. Thus, even though plaintiffs might feel uneasy about potential applications of the regulation, they are not under any present legal obligation to base their insurance underwriting practices on factors other than neutral risk considerations. *See First Federal*, 927 F.2d at 1354-55. Accordingly, we conclude that plaintiffs' challenge to HUD's regulation as applied under a disparate impact approach is not ripe for review. Thus, plaintiffs may only challenge HUD's regulation under a disparate treatment approach.

Next, plaintiffs argue that "the availability of private civil actions under the Fair Housing Act, with access to jury trials and unlimited punitive damages, will 'impair or supersede' Ohio insurance law which does not afford such remedies." Plaintiffs' Brief at 33. Plaintiffs assert that the availability of private civil remedies under the Fair Housing Act would allow a claimant to bypass the administrative procedures outlined in the Ohio Insurance Code. In *American Family*, the Seventh Circuit held that the existence of additional remedies does not cause

HUD's interpretation of the Fair Housing Act to violate the McCarran-Ferguson Act.

> In the main, federal regulation of a subject – even thoroughgoing federal regulation – does not prevent states from adding remedies to the arsenal established by federal law. The McCarran-Ferguson Act is a form of inverse preemption, so principles defining when state remedies conflict (and so are preempted by) federal law are pertinent in deciding when federal rules "invalidate, impair, or supersede" state rules.

American Family, 978 F.2d at 296; *see Merchants Home Delivery Svc., Inc. v. Reliance Group Holding, Inc.*, 1995 WL 129169, *5-*6 (9th Cir. March 28, 1995) (following *American Family* and holding that federal regulation that provides additional remedies than those provided under state insurance plan does not violate McCarran-Ferguson Act). Moreover, in *Mackey*, the Fourth Circuit held that "[t]he presence of a general regulatory scheme does not show that any particular state law would be invalidated, impaired or superseded by the application of the Fair Housing Act . . . " *Mackey*, 724 F.2d at 421. Therefore, we conclude that the presence of additional remedies in the Fair Housing Act does not cause the Act to invalidate, impair or supersede Ohio insurance law. Accordingly, we hold that the McCarran-Ferguson Act does not preclude HUD's interpretation of the Fair Housing Act.

C.

Finally, plaintiffs argue that the district court erred in dismissing plaintiffs' state law claims against the Dayton defendants. We have held that " 'generally, "if the federal

claims are dismissed before trial . . . the state claims should be dismissed as well." ' " *Landefeld v. Marion General Hospital, Inc.*, 994 F.2d 1178, 1182 (6th Cir. 1993) (quoting *Taylor v. First of America Bank-Wayne*, 973 F.2d 1284, 1287 (6th Cir. 1992) (citing *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966)). "A district court should consider the interests of judicial economy and the avoidance of multiplicity of litigation and balance those interests against needlessly deciding state law issues. . . . This court will review only for an abuse of discretion by the district court." *Landefeld*, 994 F.2d at 1182.

In this case, the magistrate judge recommended that the district court should not exercise pendent jurisdiction over the remaining state law claims because plaintiffs' claim involves a novel issue of state law. Plaintiffs assert that the Dayton Revised Code of General Ordinances conflicts with Ohio insurance and civil rights law. In addition, plaintiffs challenge the validity of a Dayton ordinance forbidding insurance redlining. We agree with the magistrate judge that "a state court is better able to determine whether state law conflicts with and supersedes an allegedly conflicting ordinance passed by and being enforced by one of the municipalities within its jurisdiction." J.A. 175. Accordingly, we hold that the district court did not abuse its discretion in dismissing plaintiffs' state law claims.

III.

For the reasons stated, the judgment of the district court is AFFIRMED.

KENNEDY, Circuit Judge, dissenting.

I respectfully dissent from the majority's opinion because I believe that Congress did not intend for the Fair Housing Act to reach the activities of the insurance industry. As the Fourth Circuit wrote in *Mackey v. Nationwide Insurance Companies*, 724 F.2d 419, 423 (4th Cir. 1984), "[i]f [§ 3604] was designed to reach every discriminatory act that might conceivably affect the availability of housing, [§ 3605's] specific prohibition of discrimination in the provision of financing would have been superfluous." Under the majority's reasoning, discrimination in financing clearly would violate section 3604.

Furthermore, repeated attempts to amend the Fair Housing Act to expressly include insurance practices have failed, although the Act has been amended to prohibit other discriminatory activities. *See id.* at 424; 42 U.S.C. § 3605. (e.g., adding discrimination by appraisers.) Additionally, the legislative history is devoid of references to the insurance industry. *Mackey*, 724 F.2d at 424. I do not believe that Congress would have intended to include insurance practices without at least considering the limitations imposed by the McCarran-Ferguson Act. Finally, I disagree with the majority that *Chevron* applies to this case. Where this Court can ascertain Congressional intent through traditional tools of statutory construction, deference to the agency's interpretation is unnecessary. *See INS v. Cardoza-Fonesca* [sic], 480 U.S. 421, 445-48 (1987).

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No: 94-3296

NATIONWIDE MUTUAL INSURANCE COMPANY and NATIONWIDE MUTUAL FIRE INSURANCE COMPANY,

Plaintiffs-Appellants,

v.

HENRY CISNEROS, Secretary of the United States Department of Housing & Urban Development; JERALD L. STEED, Executive Director, Dayton Human Relations Council; CHARLES W. BROWN, Chairperson, Dayton Human Relations Council; and CITY OF DAYTON,

Defendants-Appellees.

Before: Kennedy and Milburn, Circuit Judges; Wiseman, District Judge

JUDGMENT

(Filed May 1, 1995)

ON APPEAL from the United States District Court for the Southern District of Ohio at Dayton.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered that the judgment of the district court is AFFIRMED.

COSTS may be recovered by the defendants-appellees as provided by Rule 39, Federal Rules of Appellate Procedure.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

A True Copy

Attest:

/s/ Velina Fields
Deputy Clerk

Issued as Mandate:
August 15, 1995

COSTS:
None

Filing Fee .....$
Printing .....$

Total .....$

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

NATIONWIDE MUTUAL INSURANCE COMPANY, et al.,	:	Case No. C-3-92-52
Plaintiff(s),	:	District Judge Sandra S. Beckwith
-vs-	:	Magistrate Judge Michael R. Merz
HENRY CISNEROS, SECRETARY OF DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, et al.,	:	
Defendant(s).	:	

REPORT AND RECOMMENDATIONS CONCERNING MOTIONS TO DISMISS AND FOR SUMMARY JUDGMENT AND DECISION AND ORDER AS TO REMAINING PENDING MOTIONS

(Filed Sept. 27, 1993)

This case is before the Court on, *inter alia*, Defendant Henry Cisneros' (hereinafter "HUD") Motion to Dismiss and Renewed Motion to Dismiss, joined by Defendants Jerald L. Steed, Charles Brown, and the City of Dayton ("Dayton Defendants"), (Doc. 20, 19; 57, 58, 56), Defendants' Motion to Reconsider leave for Plaintiffs Nationwide Mutual Insurance Company and Nationwide Mutual Fire Insurance Company ("Nationwide") to file a

Fourth Amended Complaint, (Doc. 108), and cross-motions for summary judgment. (Doc. 84, 92, 93). The issues have been fully briefed by the parties, (Doc. 20, 24, 27; 19, 25, 28; 56, 60; 57, 58, 60, 63, 77, 79; 108, 113, 115; 84, 94, 95, 100; 92, 95, 99, 102; 93, 94, 99, 101, 103, 116), and the matters are ripe for decision.

Nationwide originally filed this action in the District Court for the District of Columbia, seeking declaratory and injunctive relief from attempts by HUD to enforce certain sections of the Fair Housing Act, 42 U.S.C. Sec. 3601, *et seq.*, and from attempts by the Dayton Defendants to prohibit certain of Nationwide's practices under Ohio state and Dayton municipal law. The Dayton Defendants sought and were granted a change in venue and the action was transferred to this Court.

Nationwide alleges jurisdiction pursuant to 28 U.S.C. Sec. 1331. The controversy arises under the laws of the United States, specifically the Fair Housing Act and the Administrative Procedure Act, 5 U.S.C. Secs. 701-706. Nationwide also alleges jurisdiction under the Due Process Clauses of the United States Constitution.

In essence, this action involves "redlining" in the insurance business. "Redlining" is charging higher rates or declining to write insurance for people who live in particular areas.

The Nationwide corporations are insurers incorporated under the laws of Ohio, doing business throughout the nation, including Ohio. Defendant HUD is responsible for the administration of the Fair Housing Act. Defendant Steed, as Executive Director of the Dayton Human Relations Council ("DHRC"), and Defendant

Brown, as Chairperson of the DHRC Board, assist HUD in the local administration of housing discrimination complaints.

Generally, Nationwide is seeking a declaratory judgment that HUD and DHRC lack the authority to regulate the provision and cancellation of homeowners' insurance. Nationwide also seeks corresponding injunctive relief preventing Defendants' attempts to enforce insurance regulations.

Nationwide's specific allegations are as follows: (1) HUD has exceeded the statutory authority granted to it by Congress in the Fair Housing Act; (2) HUD's determination that the Fair Housing Act authorizes it to enforce its homeowner's insurance regulations in Ohio violates the McCarran-Ferguson Act, 15 U.S.C. Sec. 1001, *et seq.* on the grounds that the federal anti-discriminatory regulation of homeowner's insurance is ineffective under McCarran because Ohio has in place the Ohio Insurance Code, O.R.C. Sec. 3901.01, *et seq.*, which includes both a prohibition of "unfair and deceptive acts" connected to underwriting standards and practices or insurance cancellation, as well as a FAIR plan authorized by the federal Urban Protection Insurance and Property Reinsurance Act, O.R.C. Sec. 3929.41, *et seq.* which provides for fire insurance coverage for what would otherwise be uninsurable risks; (3) HUD's attempts to exercise authority beyond that granted by the Fair Housing Act constitutes an unlawful delegation of authority; (4) HUD's and DHRC's attempts to regulate homeowner's insurance protections violate the United States Constitution, specifically the Due Process Clause; (5) the actions of the

Dayton Defendants in attempting to eliminate discriminatory practices exceed the authority granted by Chapter 32 of the Dayton Revised Code of General Ordinances ("Dayton Code"); (6) even if the Dayton Code does regulate insurance, it is in conflict with O.R.C. Secs. 3901.01 and 3901.0111, which calls for insurers to discriminate fairly in establishing underwriting standards, and therefore the Dayton Code subjects Nationwide to conflicting regulations; (7) the Dayton Code violates the Ohio Civil Rights Law, O.R.C. Sec. 4112.02(H)(4), which prohibits discrimination in the provision of housing, in that the anti-redlining provision in the Dayton Code calls for dissimilar risks to be treated similarly and it, in effect, calls for reverse discrimination; (8) the Dayton Code's anti-redlining provision is in conflict with the FAIR plan enacted by Ohio in that the FAIR plan arranges for insurers doing business in Ohio to pool funds payable in insuring risks otherwise uninsurable because of environmental hazards such as, according to Nationwide, those found in racially mixed neighborhood and therefore the Dayton Code requires Nationwide to bear a greater burden of those risks than those borne by Ohio insurers who have little or no presence in the City of Dayton; (9) the DHRC may not regulate racially discriminatory cancellation of homeowner's policies in the absence of a specific provision in the Dayton Code.

I. Defendants' Motion for Reconsideration

The first matter which this Court will consider is the Dayton Defendants' Motion for Reconsideration of the Court's granting leave to Nationwide to file its Fourth Amended Complaint.

The general standard for considering a motion of [sic] amend under Fed.R.Civ.P. 15(a) was enunciated by the United States Supreme Court in *Foman v. Davis*, 371 U.S. 178, 182 (1962):

> If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason – such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of any allowance of the amendment, futility of amendment, etc. – the leave sought should, as the rules require, be "freely given".

The Dayton Defendants' primary objection to allowing Nationwide to file a Fourth Amended Complaint is that this case has been pending for over two (2) years, has involved extensive briefing with respect to motions to dismiss and motions for summary judgment, and that a Fourth Amended Complaint will result in the need to again file and brief motions to dismiss and motions for summary judgment.

As noted by Nationwide in its response to the Dayton Defendants' Motion for Reconsideration, Nationwide's Fourth Amended Complaint seeks no additional relief and adds no new cause of action, but merely contains additional allegations which reflect arguments developed at greater length in its response to Defendants' motions for summary judgment. This Court agrees with Nationwide's analysis that, "the Fourth Amended Complaint will neither precipitate a new round of briefing nor

disturb the parties' pending dispositive motions which have been fully briefed and remain applicable." *See,* Doc. 113 at 2.

This Court finds that the Defendants are not and will not be prejudiced by the allowance of Nationwide filing its Fourth Amended Complaint. Therefore, the Dayton Defendants' motion for reconsideration is DENIED.

II. Defendant HUD's Motions to Dismiss

HUD's several motions to dismiss essentially raise the same issues and are all based on essentially the same arguments as discussed *infra.*

The test for dismissing a complaint under the Federal Rules is a stringent one:

> [A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957); *Neitzke v. Williams,* 490 U.S. 319, 109 S. Ct. 1827, 104 L. Ed. 2d 338 (1989); *Hishon v. King & Spalding,* 467 U.S. 69 (1984); *Nishiyama v. Dickson Cty.,* 814 F. 2d 277 (6th Cir. 1987) (en banc); *Collins v. Nagle,* 892 F. 2d 489 (6th Cir. 1989). For purposes of the motion to dismiss, the complaint must be construed in the light most favorable to the plaintiff and its allegations taken as true. *Scheuer v. Rhodes,* 416 U.S. 232 (1974); *Westlake v. Lucas,* 537 F. 2d 857 (6th Cir. 1976); *Craighead v. E.F. Hutton & Co.,* 899 F. 2d 485 (6th Cir. 1990).

The Declaratory Judgment act [sic] reads in relevant part:

> In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal obligations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. Sec. 2201(a)

"The procedure for obtaining a declaratory judgment pursuant to Title 28 U.S.C. Sec. 2201 shall be in accordance with [the Federal Rules of Civil Procedure]. . . . " Fed.R.Civ.P. 57. "The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate." *Id.* The injunctive and declaratory judgment remedies are discretionary, and courts traditionally have been reluctant to apply them to administrative determinations unless these arise in the context of a controversy "ripe" for judicial resolution. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967). The ripeness doctrine serves "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been finalized and its effects felt in a concrete way by the challenging parties." *Id.* at 148-49. A court therefore will not interfere in the resolution of issues unfit for judicial resolution; nor will a court grant declaratory relief when

the potential hardship to the parties does not merit court consideration. *Id.* at 149.

A court properly interferes in a pre-enforcement controversy between a private litigant and an administrative agency only if the issues are fit for judicial decision. An issue is fit for judicial decision when (1) the controversy presents a "purely legal issue" but only (2) if the subject matter of the controversy is a "final agency action." *Id.; see also,* 5 U.S.C. Sec. 149.

The Court notes that, as in *Abbott,* both sides in this litigation have moved for summary judgment, thereby evincing their respective beliefs that the issues are non-factual and subject to disposition as a matter of law. The primary issue is whether HUD had exceeded its authority in promulgating its regulations under the Fair Housing Act. The scope of the authority granted an agency by statute is a purely legal issue. *Athlone Industries v. Consumer Product Safety Commission,* 707 F.2d 1485, 1489 (D.C. Cir. 1983). Likewise, the question of whether an administrative agency exceeds its statutory authority in promulgating a given regulation is a purely legal question. *Toilet Goods Association v. Gardner,* 387 U.S. 158, 163 (1967). Therefore, the issues presented by Nationwide's complaint are purely legal and fit for judicial resolution.

In addition, the subject matter of the controversy in this case, as it relates to HUD, is a final agency action.

Agency actions in the form of a regulation are final when such regulations have the force of law before their sanctions are invoked as well as after. *Columbia Broadcasting System v. United States,* 316 U.S. 407, 418 (1942). A regulation "promulgated in a formal manner after notice

and evaluation of written comments . . . is a 'final agency action.' " *Toilet Goods*, 387 U.S. at 162. In other words, a reviewable agency action has "determinate consequences for the party to the proceeding." *ITT v. Electrical Workers*, 419 U.S. 428, 443 (1975). Judicial review, then, is not prevented solely on the ground that the regulation merely explains how the agency would interpret the statute if it should bring an action against one subject to the statute. *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 198 (1956).

The Sixth Circuit has drawn a very fine line between agency actions that are final and those that are not. *Compare, Franklin Federal Savings Bank v. Director, Office of Thrift Supervision*, 927 F.2d 1332, 1336-38 (6th Cir. 1991), *with, First Federal Savings Bank and Trust Co. v. Ryan*, 927 F.2d 1345, 1352-55 (6th Cir. 1991).

In *First Federal*, the plaintiff sought to prevent the Office of Thrift Supervision from exercising its authority to appoint a receiver for a financial institution when the unstable condition of that institution so warrants. *First Federal*, 927 F.2d 1345. OTS had yet to appoint a receiver at the time the action was filed; First Federal merely feared that such an appointment was imminent. *Id.* The Sixth Circuit held that "[m]ere contemplation of a course of action does not constitute a final agency action," reasoning that "the focus of the *Abbott* test is on the consequence of agency action even absent enforcement action, not on the deleterious effect of possible future enforcement action itself. *Id.* The *First Federal* Court found the prospective nature of the challenged agency action a bar to judicial review.

In *Franklin Federal,* on the other hand, the plaintiff bank questioned OTS' claim that any agreement as to the accounting procedures to be applied to Franklin Federal's operation constituted a nonbinding statement. *Franklin Federal,* 927 F.2d at 1334. The bank also questioned the OTS interpretation of the Financial Institutions Reform Recovery and Enforcement Act of 1989. The *Franklin Federal* court noted that the purpose of the finality requirement was "to determine 'if the agency's position is merely tentative or, on the other hand, whether the agency views its deliberative process as sufficiently final to demand compliance with its announced position.' " *Id.* at 1337, *quoting, Ciba-Geigy Corporation v. United States Environmental Protection Agency,* 801 F.2d 430, 436 (D.C.Cir. 1986). The Sixth Circuit then concluded that an agency action sufficiently final to be defended on the basis of *Chevron U.S.A., Inc. v. Natural Resources Defense Council,* 467 U.S. 837 (1984), should be treated as a final agency action for the purposes of applying the *Abbott* test. *Franklin Federal,* 927 F.2d at 1337.

The crucial factual difference between *First Federal* and *Franklin Federal* is that *First Federal* questioned only the applicability of the OTS position to itself; *Franklin Federal,* on the other hand, questioned the validity of the OTS position as it incidentally applied to Franklin Federal. *See, Franklin Federal,* 927 F.2d at 1336 ("Here, the plaintiff institution has asked for . . . an injunction against *the application of certain rules.*") (emphasis supplied). In *First Federal,* by contrast, the plaintiff asked for an injunction preventing the OTS *from taking a particular action." Franklin Federal,* 927 F.2d at 1338 (emphasis supplied).

The issues raised by Nationwide's complaint are more similar to the issues raised in *Franklin Federal* than to those raised in *First Federal*. Here Nationwide is asking for a statement clarifying the legal applicability to HUD's regulation to the insurance industry as a whole. Nationwide is not asking for a determination as to the factual application of the regulation to its particular underwriting standards. Nationwide's complaint seeks a declaratory judgment on a purely legal issue as to a final agency action.

In addition, the potential hardship to the parties is sufficient to merit a court's consideration. A regulation that "purport[s] to give an authoritative interpretation that has a direct effect on the day-to-day business" of members of the regulated industry has an "impact . . . sufficiently direct and immediate as to render the issue appropriate for judicial review" at the pre-enforcement stage. *Abbott*, 387 U.S. at 152. "Where a regulation requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance, access to the courts under the Administrative Procedure Act and the Declaratory Judgment Act must be permitted, absent a statutory bar or some other unusual circumstance." *Id.* at 153. But when primary conduct is not affected and no advance action is required of members of the regulated industry, judicial review is unnecessary until a member has specifically refused to comply and enforcement is sought against that member. *Toilet Goods*, 387 U.S. at 165. Although "some uncertainty" is not enough, review may be had when "the mere promulgation of administrative regulations would impose "debilitating uncertainties" on

the parties. *Id.* The requisite hardship is a dilemma between disadvantageous compliance with final agency action and the risk of prosecution and penalties. *Seattle Pacific University v. Haas*, 626 F.Supp. 539, 541 (W.D.Wash. 1985).

HUD's regulation affects the underwriting and cancellation standards of homeowner's insurance providers. HUD's position is that it may regulate such insurers; Nationwide's position is that it may not. If HUD is correct, not only Nationwide, but all insurers who provide homeowner's coverage must alter any standards inconsistent with HUD's policies and shall have to continue to do so in the future. An insurer's underwriting standards provide the foundation for daily decisions whether to insure and at what rate to insure. Clearly, then, HUD's regulation affects the primary business of insurers. On the other hand, compliance with the HUD regulation, if it is invalid, could cause insurers unnecessarily to bind themselves to cover risks they would otherwise have refused to accept.

Nationwide has alleged that uncertainty as to the validity of HUD's regulation makes insurers unsure about what appropriate underwriting standards are, but goes on to assume that alterations in their standards will be necessary. Nationwide alleges that HUD's regulation will force insurers to incur significant costs in the revision of their standards and in the retraining of underwriters to apply the new standards once they are developed. These expenses, combined with the uncertainty inherent in developing appropriate standards, constitutes sufficient hardship to make the issues ripe for pre-enforcement review. Nationwide need not be left in a position in

which it must decide between insuring otherwise acceptable risks and possibly violating the Fair Housing Act.

With respect to the issue of exhaustion, this Court concludes that Nationwide has not failed to exhaust any available administrative remedies.

As a general matter . . . the exhaustion doctrine provides that challenges to agency action should not be heard until relevant administrative proceedings have been concluded. *McKart v. United States,* 395 U.S. 185, 194-95 (1969). Ordinarily, no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted. *Myers v. Bethlehem Shipbuilding Corp.,* 303 U.S. 41, 50-51 (1938). Nonetheless, application of the [exhaustion] doctrine to specific cases requires an understanding of its purposes and of the particular administrative scheme involved. *McKart,* 395 U.S. at 193. The exhaustion doctrine promotes efficiency in both the courts and in the agency by preventing "premature interruption of the administrative process." *Id.* The exhaustion doctrine permits the administrative agency to engage in fact finding; to exercise its special competence and correct its errors; and to reach a dispositive solution so as to make judicial intervention unnecessary. *City of Mt. Clemens v. United States Environmental Protection Agency,* 917 F.2d 908, 914 (6th Cir. 1990); *see also, Robinson v. Dow,* 522 F.2d 855 (6th Cir. 1975). Where pursuit of administrative remedies does not serve the purposes behind the exhaustion doctrine, the courts have allowed a number of exceptions. *Shawnee Coal Co. v. Andrus,* 661 F.2d 1083, 1093 (6th Cir. 1981).

One of these exceptions is the futility exception. Since the [exhaustion] doctrine is not linked to the power of the court to entertain actions, but instead implicates prudential considerations, the exhaustion doctrine may be . . . disregarded by the court when application of the doctrine would be futile." *City of Mt. Clemens,* 917 F.2d at 914. Certainly, exhaustion is not required where it is highly unlikely that the agency would change its position if the case were remanded to it. *Atlantic Richfield Co. v. Department of Energy,* 769 F.2d 711, 782 (D.C.Cir. 1983). When an agency has never given an inkling that it would consider a matter afresh, and when the regulations in question have received careful attention within and outside the agency, exhaustion is not required. *City of Mt. Clemens,* 917 F.2d at 914. The question whether an agency has exceeded its statutory authority in establishing regulations is the type of question that courts have, in the past, been willing to entertain without imposing the requirement that the plaintiff have [sic] exhausted its administrative remedy. *Toilet Goods,* 387 U.S. at 158.

The futility exception, however, is an exception from that set forth in *Leedom v. Kyne,* 358 U.S. [sic] (1958), where an agency action contrary to an agency's authorizing statute is subject to immediate judicial review. The *Leedom* exception is a narrow anomaly reserved for extreme situations, *Shawnee Coal,* 661 F.2d at 1093, and does not apply here. Merely raising the question of whether the agency exceeded its authority will not ordinarily confer immediate reviewability; the agency must first have the opportunity to examine the scope of its authority and withdraw the questioned action. *Id.*

In *City of Mt. Clemens*, the Sixth Circuit found that the Environmental Protection Agency had committed itself so firmly to an adverse course of action that nothing stood to be gained by requiring that the City deal further with the agency. 917 F.2d at 914. HUD's position here is similar to that of the EPA in *Mt. Clemens*, HUD has consistently stated that it would view insurance red-lining as a violation of 42 U.S.C. Sec. 3604. After being authorized to make regulations, the Secretary went through the notice procedures and put forth a regulation to that effect. HUD has not reconsidered its interpretation subsequent to Nationwide's complaint; in fact, it argues vehemently in favor of its interpretation. Therefore, the futility exception applies to Nationwide's complaint, and there are no administrative remedies available that Nationwide need exhaust before presenting its claims to a federal court.

For all of the foregoing reasons, this Court concludes that at the motion to dismiss stage of this litigation, it does not appear beyond all doubt that Nationwide can prove no set of facts in support of its claim which would entitle it to relief as to its claims against HUD, and therefore HUD's various motions to dismiss, (Doc. 20, 57, 109), should be denied.

III. Dayton Defendants' Motions to Dismiss

Under 28 U.S.C. § 1367, the codification of the pendent jurisdiction doctrine, federal district courts have original subject matter jurisdiction over all non-federal claims that are so related to the claims over which we have original jurisdiction as to form part of the same case or controversy under Article III of the Constitution.

Nationwide's state law claims meet that constitutional test.

However, I conclude and recommend that the Court should decline to exercise its supplemental jurisdiction over Nationwide's state law claims. Nationwide's claims against the Dayton Defendants involve allegations that the Dayton Revised Code of General Ordinances ("RCGO") conflicts with Ohio state insurance and civil rights law. Nationwide also challenges the validity of the RCGO's definition of insurance redlining. These claims raise novel issues of state law and thus this Court may decline to exercise supplemental jurisdiction under 28 U.S.C. §1367(c)(1). Certainly, a state court is better able to determine whether state law conflicts with and supersedes an allegedly conflicting ordinance passed by and being enforced by one of the municipalities within its jurisdiction. The parties to this litigation are entitled to a "surer-footed" reading of the applicable state and municipal laws. This is especially true in light of the fact that this Court concludes that Nationwide's federal claims are without merit, *See, infra.* Indeed, the claim that Dayton's ordinances conflict with Ohio state law makes an implicit Ohio constitutional claim which this Court may be required to abstain from deciding. *Railroad Com. of Texas v. Pullman Co.*, 312 U.S. 496, 61 S. Ct. 643, 85 L. Ed. 971 (1941).

In addition to the foregoing reasons, in reaching this conclusion, this Court is mindful that Nationwide's claims arose out of an investigation by the DHRC into the cancellation by Nationwide of a homeowner's insurance policy. Section 32.20(K) of the RCGO provides that, in

accordance with Ohio Revised Code Chapter 2506, a judicial remedy is available to any party aggrieved by a final order of the DHRC. Chapter 2506 of the Ohio Revised Code, which sets forth the procedure for judicial review of the final orders of administrative agencies, provides for review of DHRC's final decision by a court of common pleas. *See*, O.R.C. Sec. 2506.01. In view of the fact that the proceedings before the DHRC have not yet been completed, in the interest of comity, this Court concludes that Nationwide's state law claims are best left to Ohio courts.

For all of the foregoing reasons, this Court concludes that the Dayton Defendants' various motions to dismiss, (Doc. 19, 56, 57), should be granted and Nationwide's state law claims should be dismissed without prejudice.

Having reached these results, this Court concludes that Nationwide's motion for a hearing on Defendants' motions to dismiss, (Doc. 26), should be denied as moot.

IV. Cross-Motions for Summary Judgment

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56. On a motion for summary judgment, the movant has the burden of showing that there exists no genuine issue of material fact, and the evidence, together with all inferences that can reasonably be drawn therefrom, must be read in the light most favorable to the party opposing the motion. *Adickes v. S.H. Kress & Co.*,

398 U.S. 144, 157-59 (1970). Nevertheless, the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material fact*. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis in original). Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to "secure the just, speedy and inexpensive determination of every action." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).

Read together, *Liberty Lobby* and *Celotex* stand for the proposition that a party may move for summary judgment asserting that the opposing party will not be able to produce sufficient evidence at trial to withstand a Rule 50 motion for judgment as a matter of law. *See, Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1478 (6th Cir. 1989). If, after sufficient time for discovery, the opposing party is unable to demonstrate that he or she can do so under the *Liberty Lobby* criteria, summary judgment is appropriate. *Id.* The opposing party must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

As noted *supra*, the issues involved in this case are purely legal, and therefore, the matter may properly be determined by summary judgment procedure.

Simply stated, this litigation poses the question of whether HUD has delegated authority under the Fair

Housing Act to regulate Nationwide's insurance underwriting practices. Nationwide's position, of course, is that HUD has exceeded its authority, while HUD argues that it has not.

Under the Fair Housing Act, it is unlawful:

> To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make available or deny, a dwelling to any person because of race. . . .

42 U.S.C. Sec. 3604(a).

It is also unlawful:

> To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services . . . in connection therewith, because of race. . . .

42 U.S.C. Sec. 3604(b).

Under these provisions of the Fair Housing Act, HUD has listed as prohibited conduct "[r]efusing to provide . . . property or hazard insurance for dwellings or providing such . . . insurance differently because of race. 24 C.F.R. Sec. 100.70(a)(4).

Nationwide argues that HUD, in promulgating the above cited regulation, has exceeded the authority delegated to it by Congress under the Fair Housing Act, and therefore the Dayton Defendants have no authority to investigate claims of discriminatory insurance underwriting practices.

I conclude and recommend the Court decide that HUD has not exceeded its statutory authority in enacting

its regulations because the interpretation of the Fair Housing Act embodied in that regulation is one to which judicial deference is to be accorded under *Chevron, supra.* Furthermore, even in the absence of *Chevron* deference, HUD's interpretation of the Fair Housing Act is correct.

In proper circumstances, "substantial deference is accorded to the interpretation of the authorizing statute by the agency authorized with administering it." *Rust v. Sullivan,* ___ U.S. ___, 111 S.Ct. 1759, 1767 (1991). The circumstances in which this deference to agency statutory interpretation is applicable were outlined in *Chevron,* 467 U.S. at 843. The first step in deciding whether to accord deference is to look for congressional intent, as evidenced in the statute. If the statutory language is clear, then the agency has no choice but to give it effect. *Id.* On the other hand, if ambiguity exists, or if the statute is silent on the matter, then deference is to be accorded by the court. *Id.* The question then becomes, not whether the court's interpretation coincides with that of the agency, but rather whether the agency action founds itself on "a permissible construction of the statute." *Id.* A court may not substitute its own construction of a statutory provision for a reasonable interpretation made by an administrative agency. *Id.* at 844. Therefore, the determination whether HUD has authority to promulgate and enforce the regulation at issue depends on whether the regulation represents an interpretation that is both permissible and reasonable.

This Court has already determined that this issue is appropriate for application of *Chevron* deference to the interpretation of the administrative agency. *See, McDiarmid v. Economy Fire & Casualty Co.,* 604 F.Supp. 105, 107

(S.D.Ohio 1984); *Dunn v. Midwestern Indemnity Mid-American Fire and Casualty Co.*, 472 F.Supp. 1006 (S.D.Ohio 1979); *Pierce v. Metropolitan Property and Liability Insurance Co.*, Case No. C-3-82-044 (S.D.Ohio, Nov. 20, 1983) (unpublished). Because, as previously decided by this Court, and as further discussed below, the agency interpretation is both permissible and reasonable, this Court will defer to that interpretation.

The power of an administrative agency to administer a congressionally created and funded program necessarily requires the formulation of policy and the making of rules to fill any gaps left, implicitly or explicitly by Congress. *Morton v. Ruiz*, 415 U.S. 199, 231 (1974). Deference does not mean acquiescence, and courts therefore need not defer to an implausible agency interpretation. *Presley v. Etoweh City Commission*, 502 U.S. 820, 831 (1992). However, only if Congress has "directly spoken to the precise question at issue will a court refuse to defer to a reasonable agency interpretation. *Chevron*, 467 U.S. at 842.

Here, Congress has made a vague statement that could be read to say that the Fair Housing Act applies to insurance redlining:

> The Fair Housing Act does not define key terms such as "service" and "make unavailable". By writing its statute in the passive voice – banning an outcome while not saying *who* the actor is, or *how* such actors bring about the forbidden consequence – Congress created ambiguity.

N.A.A.C.P. v. American Family Mutual Insurance Co., 978 F.2d 287, 298 (7th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 2335 (1993) (emphasis in original). Section 3604 [of

the Fair Housing Act] is sufficiently pliable that its text can bear the Secretary's construction. *Id.* at 300.

Whether or not it intended to do so, Congress enacted a statute that is quite vague, and therefore subject to varying interpretations. HUD has attempted to clarify the issue by promulgating its regulation. The ambiguity requisite to *Chevron* deference exists in the Fair Housing Act.

Additionally, for *Chevron* analysis purposes, "congressional failure to reverse or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *N.L.R.B. v. Bell Aerospace Co., Division of Textron, Inc.*, 416 U.S. 267, 274-75 (1974). That Congress has permitted a regulation to stand may be considered in determining whether the court should defer to the agency. *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 845 (1986). On the other hand, Nationwide argues that it is also valuable to consider the fact that Congress has acted to amend the agency's authorizing statute subsequent to promulgation of a disputed regulation without having taken action to strengthen the agency's position.

Courts which have addressed the issue of congressional failure to incorporate the agency's interpretation into subsequent amendments generally have pointed out that "several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change." *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990). Courts are therefore "generally reluctant to

draw inferences from Congress' failure to act." *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 306 (1988).

In the specific context of the Fair Housing Act, the same reluctance has appeared. *See, i.e., American Family*, 978 F.2d at 299. Even more specifically, in this Court, *McDiarmid, supra*, disposes of the notion that subsequent amendment, without attention to the regulation at issue here, negates reading the Fair Housing Act to apply to insurance redlining:

> [T]he *Mackey* court relied, in part, on repeated efforts in Congress to amend Title VIII to expressly extend to coverage of discrimination in the provision of insurance on dwellings. This Court is unwilling to rely on the subsequent, after the fact actions of Congress as a mean to divine the legislative intent in Title VIII as of the time of its enactment. Relying on this type of after the fact legislative history is speculative at best, because the Court has no way of knowing why the proposed amendments were rejected. The amendments may have been rejected because Congress did not think the insurance industry should be regulated by Title VIII. However, it is equally likely that Congress perceived the amendments to be unnecessary because insurance or insurance redlining was already within the coverage of Title VIII.

McDiarmid, 604 F.Supp. at 107.

Subsequent inaction, then, is not a sufficiently clear indicator of Congressional intent to overcome the *Chevron* deference principle.

I also conclude that HUD is authorized to promulgate the regulation at issue.

Under the Fair Housing Act, "[t]he Secretary may make such rules . . . to carry out this subchapter. . . . " This is not an instance of "express delegation of authority to the agency to elucidate a specific provision of the statute by regulation", and HUD's interpretation is therefore not subject to the "arbitrary, capricious, or manifestly contrary to statute" standard described in *Chevron*. Rather, this is an express delegation to explain the statute as a whole, which only implicitly authorizes HUD to define such vague terms as "otherwise make available or deny". Where the empowering provision of a statute states simply that the agency may make such rules and regulations as may be necessary to carry out the provisions of the Act, the validity of a regulation promulgated thereunder will be sustained so long as it is "reasonably related to the purposes of the enabling legislation." *Mourning v. Family Publications Services, Inc.*, 411 U.S. 356, 369 (1973), *citing, Thorpe v. Housing Authority of the City of Durham*, 393 U.S. 268, 280-81 (1969).

The purpose of the Fair Housing Act as a whole is "to eliminate the discriminatory business practices which might prevent a person economically able to do so from purchasing a house regardless of his race. *Dunn*, 472 F.Supp. at 1009 (citation omitted). The Fair Housing Act, then, reveals a broad legislative plan to eliminate all traces of discrimination within the housing field. *Marr v. Rife*, 503 F.2d 735, 740 (6th Cir. 1974). For this reason, it has long been held that the remedial provisions of the Fair Housing Act are to be given "a generous construction". *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 212 (1972). HUD considered previous judicial interpretation of the Fair Housing Act before promulgating its

regulation, *see* 53 Fed. Reg. 44997, and justified its promulgation as follows:

> [A]s discussed in the preamble to the proposed rule, discrimination in the provision of those services and facilities which are prerequisites to obtaining dwellings, including refusals to provide . . . adequate property or hazard insurance because of race . . . render housing unavailable in violation of the Fair Housing Act. In order to indicate that the refusal to provide . . . property or hazard insurance for dwellings because of race . . . can constitute a violation of 'otherwise make available or deny' provisions in the Act, the language in [Sec.] 100.70(d) has been revised and a new illustration has been added. 24 C.F.R. Ch. 1, Subch. A, App. 1, pp. 550-551.

Clearly, then, HUD's regulation is "reasonably related" to the purpose of the Fair Housing Act, and the interpretation embodied therein is to be accorded judicial deference as long as that interpretation is reasonable.

HUD's interpretation of the Fair Housing Act is reasonable. Under *Chevron* "*considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer.*" *Chevron*, 467 U.S. at 844. Unless the complaining party can show by reference to either the statutory text or the legislative history that the agency interpretation is violative of Congressional intent, courts will defer to the agency interpretation. *Id.* at 845; *LTV Corp.*, 496 U.S. at 650; *United States v. Shimer*, 376 U.S. 374, 382-83 (1961). In the absence of contrary statutory language or legislative history, the question becomes, not whether the court would determine *de novo* that the agency interpretation is the correct

interpretation of the statute, but rather whether the already existing interpretation provided by the agency is reasonable. *Chevron*, 467 U.S. at 846.

With respect to the Fair Housing Act, there is no clear indication of contrary legislative intent in the text of the statute. As discussed above, the text of 42 U.S.C. Sec. 3604 is vague and subject to differing interpretations. Recalling that the *Chevron* standard is "reasonableness" not "correctness", it is not necessary that the interpretation adopted by the agency be the only permissible interpretation, or whether the interpretation be the most reasonable interpretation presented. The question is merely whether the particular interpretation applied by the agency is reasonable.

The Fair Housing Act states that "it shall be unlawful" to participate in certain listed activities. The statute does not specify to whose activities the section is addressed. Absence of reference to insurers or insurance practices does not negate application of section 3604 to insurers because, although "[s]elective omission might be telling . . . the universal omission that accompanies passive construction does not distinguish insurers from others." *American Family*, 978 F.2d at 299. There is therefore "[n]othing in the text of the statute [that] permits us to reject HUD's interpretation, in accordance with the *Chevron* clear indication standard. *Id.* at 298.

Nationwide contends that the interpretation embodied in HUD's regulation is unreasonable because insurance redlining is not mentioned in section 3604. In support of its position, Nationwide relies on the principle of *expressio unius est exclusio alterius*. However, under

Chevron, a party challenging an agency interpretation must make as [sic] affirmative showing that Congress intended that the interpretation not apply. *Chevron*, 407 U.S. at 845. The question, for *Chevron* analysis purposes, then, is not whether Congress intended to include insurance redlining in the list of prohibited activities, but rather whether Congress indicated it [sic] intent to exclude insurance redlining from that list.

> Whatever its usefulness in other circumstances, . . . [an *expressio* argument] has little force in the administrative setting. . . . [T]he *expressio* canon is simply too thin a reed to support the conclusion that Congress has clearly resolved this issue. . . . Having decided that, we must defer to refusal to read the Act in the manner suggested by the *expressio* cannon if its interpretation is otherwise reasonable.

Texas Rural Legal Aid, Inc. v. Legal Services Corp., 940 F.2d 685, 694 (D.C.Cir. 1991). Clearly, then, the *expressio* canon and its unstated assumption that statutes never lapse is inapplicable to the *Chevron* analysis. *See, American Family, supra.*

Nationwide also argues that under HUD's interpretation, section 3604 makes section 3605 superfluous. The *ejusdem generis* argument is also one which goes to the correctness of the agency's interpretation, and not to its reasonableness. HUD's interpretation, being reasonably connected to the purposes of the Fair Housing Act, will stand against an *ejusdem generis* argument. *See, infra.*

The *Mackey* court recognized that Congress had failed to address the issue of redlining in its discussion of the bill which became the Fair Housing Act:

> While the statute in [section] 805 specifically prohibits discrimination in providing financial assistance, there is not mention in the Fair Housing Act of insurance. The legislative history contains no discussion of a barrier to fair housing created by the insurance industry.

Mackey, 724 F.2d at 423.

Silence in the legislative history could imply that Members of Congress did not anticipate that the law would apply to insurer, or could equally imply that the debate was about the principle of nondiscrimination, leaving detail to the future. In any case, silence is insufficient to overcome *Chevron* deference. *LTV Corp.*, 496 U.S. at 649.

Relying primarily on *Bowen v. American Hospital Association*, 476 U.S. 610 (1986), Nationwide argues that *Chevron* deference should not apply to this case because the subject matter of HUD's regulation is not a technical issue, but rather an issue of policy. As noted by the Seventh Circuit:

> [W]here a statute strikes a political balance but administration of the statute is entrusted to an agency that may not embody that balance, it is dangerous to defer automatically to the agency's view. An agency that may be dominated by one faction in the legislative struggle that led to enactment of the compromise is not authorized to hand that faction a victory that was denied it in the legislative arena through the efforts of another faction. The court must enforce the compromise, not the maximum position of one of the interest groups among which the compromise was struck.

Bethlehem Steel Corp. v. United States Environmental Protection Agency, 723 F.2d 1303, 1309 (7th Cir. 1983).

There is no indication in *Chevron* that its holding is to be limited to its facts. In fact, it is "entirely appropriate" under *Chevron* for an agency to "resolv[e] the competing interests which Congress itself either inadvertently did not resolve or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities." *Chevron*, 467 U.S. at 865-66.

Additionally, the regulation in *Bowen* was promulgated under the authority of a delegation of power to any agency head, "regardless of his agency's mission or expertise" to issue regulations to implement the Rehabilitation Act. *Bowen*, 476 U.S. at 642. The Fair Housing Act, on the other hand, gives authority only to HUD to regulate activities thereunder.

The Fair Housing Act, as discussed above, is quite vague. Section 3604 is so vague that it is difficult to believe that the vagueness could be accidental. The lack of clarity in the statute, coupled with the grant of exclusive authority to administer the Fair Housing Act, leads to the conclusion that the non-technical aspect of the issue does not preclude *Chevron* deference.

Entirely apart from *Chevron* deference, this Court should conclude that HUD's interpretation of the Fair Housing Act is correct.

Courts in the Sixth Circuit have followed the lead of the Supreme Court in *Trafficante, supra*, by "paint[ing] with a broad brush when sketching the parameters of Title VII." *McDiarmid*, 604 F.Supp. at 107. Accordingly, the

phrase "otherwise make available or deny" is applied broadly in the Sixth Circuit, and in other courts as well. *Dunn*, 472 F.Supp. at 1108, *citing*, *United States v. Youritan Construction Co.*, 370 F.Supp. 643, 648 (N.D.Cal. 1973); *Zuch v. Hussey*, 366 F.Supp. 553, 557 (E.D.Mich. 1973); *Laufman v. Oakley Building and Loan Co.*, 408 F.Supp. 489 (S.D.Ohio 1976); *United States v. American Institute of Real Estate Appraisers*, 442 F. Supp. 1072 (N.D.Ill. 1977), *cited in*, *McDiarmid*, 604 F.Supp at 107. The question whether the Congress has authorized HUD to regulate insurance redlining practices, then, must be addressed in the context of these broad remedial purposes of the Fair Housing Act. HUD's regulation is closely connected to the purpose of the Fair Housing Act. Because, as discussed below, it is also consonant with the text and history of the Act, HUD's interpretation is not only reasonable, it is also correct.

HUD's regulation embodies a correct interpretation of the Fair Housing Act if insurance redlining would "otherwise make available or deny . . . a dwelling . . . because of race. 42 U.S.C. Sec. 3604(a).

> Adequate insurance coverage is often a prerequisite to obtaining financing. Insurance redlining, by denying or impeding coverage makes mortgage money unavailable, rendering dwellings "unavailable" as effectively as the denial of financial assistance on other grounds.

Dunn, 472 F.Supp. at 1109; *see also*, *McDiarmid*, 604 F.Supp. at 107.

Discriminatory insurance practices therefore come within the scope of the Fair Housing Act, which serves "to prohibit not only direct discrimination, but also all

practices which have a racially discriminatory effect." *Zuch, supra.* The promulgation of insurance standards which cause appraisers and lenders to treat race and national origin as a negative factor in determining the value of dwellings, and in evaluating the soundness of home loans may effectively "make unavailable or deny" a "dwelling" and may "interfere" with persons in the exercise and enjoyment of rights guaranteed by the Act. Nationwide admits that property insurance is generally required by potential mortgagors as a condition for owning and maintaining a home. When such denial or interference occurs as a result of considerations relating to race or national origin, there has been a violation of the Fair Housing Act. *See, i.e., Dunn, supra; McDiarmid, supra; Zuch, supra.* In general, "the [Fair Housing] Act prohibits discriminatory housing practices." *Dunn,* 472 F.Supp. at 1108.

Thus, insurance redlining can make one's chosen housing unavailable because of race. Therefore, HUD's regulation, in the absence of indications to the contrary, embodies a correct interpretation of the Fair Housing Act.

Nationwide argues, however, that HUD's regulation is not to be given effect because the underlying statutory interpretation is inconsistent with several time-honored canons of construction: that *expressio unius est exclusio alterius* is violated by the administrative inclusion of insurance redlining in a congressionally generated list of prohibited activities; that *ejusdem generis* is violated by the inclusion of insurance redlining in a lost [sic] of insufficiently related items; that the Whole Act Rule is violated because HUD's interpretation of section 3604 makes section 3605 superfluous.

It is in addressing the question of whether HUD's interpretation is correct that Nationwide's *expressio* argument becomes relevant. Nationwide criticizes the *American Family* decision for its failure to attach any significance to the fact that, although several potential evils were addressed by the statute, insurance redlining is not included in that list. However, *American Family* did address this issue by pointing out that:

> Conveying meaning to diverse interpreters for an uncertain future is a difficult business. A wise drafter may state a principle in one section and list some applications of that principle in another, to make pellucid what ought to be apparent but which some judges (and many lay persons) will miss unless spelled out. Using the instance to restrict the principle would gum up to [sic] process of communication, inverting every effort to clarify.

American Family, 978 F.2d at 299.

It is noteworthy that Congress did not attempt to clarify all of the potential actors to whom section 3604 should apply. Instead, it contented itself with a passive construction subject to broadly inclusive reading. *See, American Family*, supra. Nor did it attempt to enumerate each act that is prohibited to these potential actors. A plain meaning analysis simply is not very helpful in interpreting a statute that appears to have been designed to have no plain meaning.

Because of the clear connection between insurability and the ability to own a home, an *expressio* argument is

insufficient to overcome the close relationship of the regulation to accomplishment of the Fair Housing Act ends, even in the absence of *Chevron* deference.

Similarly, an *ejusdem generis* argument does not negate inclusion of insurance redlining within the list of activities prohibited under section 3604.

Nationwide argues that insurance redlining is not sufficiently closely related to the specific wrongs listed in section 3604 to permit its inclusion in the "otherwise make available or deny" language that follows the specific language. Section 3604 specifically prohibits refusal "to sell or rent" or "to negotiate for the sale or rental" for discriminatory reasons.

Where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words. *Otis Elevator Co. v. Secretary of Labor*, 921 F.2d 1285, 1289 (D.C.Cir. 1990). However, *ejusdem generis* applies where a statute uses a conjunctive connector between the specific items and the general words. *Id.* Section 3604 connects the specific list with the general phrase using the disjunctive "or". The *ejusdem generis* principle is too weak in the disjunctive context to overcome the important policies of the Fair Housing Act.

Nationwide also argues that the Whole Act Rule negates the inclusion of insurance redlining within the list of activities prohibited under section 3604 on the basis that HUD's interpretation of section 3604 renders section 3605 superfluous. Section 3605 makes it unlawful, first of all, "to deny a loan or other financial assistance to

a person applying therefore for the purpose of purchasing, constructing, improving, repairing or maintaining a dwelling . . . because of race." 42 U.S.C. Sec. 3605. It is also unlawful

> [T]o discriminate against him in the fixing of the amount, interest rate, duration, or other terms or conditions of such loan or other financial assistance, because of the race, color, sex, or national origin of such person or of any person associated with him in connection with such loan or other financial assistance, or of the present or prospective owners, lessees, tenants, or occupants of the dwelling or dwellings in relation to which such loan or other financial assistance is to be made or given. . . .

Id.

Although insurers are mentioned in the preface to this enumeration, what are typically thought of as insurance practices are not.

Although courts avoid statutory constructions that render portions of statutes superfluous, *Lynch v. Lyng*, 872 F.2d 718, 723 (6th Cir. 1989), the purported conflict between section 3604 as HUD interprets it and section 3605 has not prevented this Court and others from applying section 3604 to a number of parties and practices not mentioned in section 3605. *See, United States v. City of Parma*, 661 F.2d 562 (6th Cir. 1981) (imposition of building height limitations); *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977) (issuance of zoning permits); *Kennedy Park Homes Association Inc. v. City of Lackawanna*, 436 F.2d 108 (2d Cir. 1970) (sewer hook-ups); *United States v. American Institute*

of Real Estate Appraisers, 442 F.Supp. 1072 (N.D.Ill. 1977) (real estate appraisals); *Laufman v. Oakley Building and Loan Co.,* 408 F.Supp. 489 (S.D.Ohio 1976) (mortgage lenders); *United States v. Youritan Construction Co.,* 370 F.Supp. 643 (N.D.Cal. 1973) (delaying rental applications); *Zuch v. Hussey,* 355 F.Supp. 553 (E.D.Mich. 1973) (encouraging "white flight").

The vague language of section 3604 leads inevitably to the conclusion that section 3605 is intended to provide examples of forbidden practices and was not intended to provide an exclusive list that would render the "otherwise make available or deny" language of the statute superfluous.

This Court also concludes that the legislative history of the Fair Housing Act does not negate an interpretation of section 3604 to prohibit insurance redlining.

The purposes and remedial nature of the Fair Housing Act have been discussed above. However, "no legislation pursues its purposes at all costs. . . . Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice." *Rodriquez v. United States,* 480 U.S. 522, 525-26 (1987). The Fair Housing Act was introduced for the purpose of eliminating discriminatory practices of property owners, real estate brokers, builders, and home financiers. *See,* H.R. 2416. Insurers are not mentioned. *Mackey,* 724 F.2d at 423. It remains, however, that discriminatory insurance practices necessarily result in disparate availability of home financing. Because elimination of discriminatory insurance practices is necessary to the accomplishment of the legislative purpose, silence in the

legislative history is not enough to overcome the close nexus between insurance practices and lending practices.

Further, subsequent legislative action, to the limited extent of its usefulness, points toward congressional approval of HUD's interpretation.

Although the view of a later Congress does not definitively establish the meaning of an earlier enactment, it does have some persuasive value. *Bennett v. Kentucky Department of Education*, 470 U.S. 656, 665 n.3 (1985) (citation omitted). After the original Fair Housing Act was passed in 1978, there were numerous efforts to amend it which culminated with the passage of the Fair Housing Act of 1988, with its explicit mandate to HUD to issue implementing regulations. The 1979 amendment failed to refer specifically to insurers. *See*, 126 Cong. Rec. 3665 (1979). In 1980, the House passed H.R. 5200, which would have, *inter alia*, added a new subsection (f) to section 804, prohibiting discrimination in the provision of hazard insurance. See, 126 Cong. Rec. 14477 (June 12, 1980); *see also*, 126 Cong. Rec. 13985 (June 11, 1980). Citing this Court's decision in *Dunn*, the House Judiciary Committee Report on H.R. 5200 states that this subsection "codifies existing law" and was intended to clarify and provide "greater specificity in substantive coverage." H.R. Rep. No. 96-865, 96th Cong., 2d Sess. 7-8 (1980). After passage in the House, H.R. 5200 went to the Senate, where it died after supporters failed to win a cloture vote. *See*, 126 Cong. Rec. 23989 (December 9, 1980). Only after the failed cloture vote did Senators Heflin and Hatch make statements on the floor on the issue of homeowner's insurance. *See*, 126 Cong. Rec. 32991032996 (December 9, 1980).

In 1988, four years after *Mackey*, and nine years after *Dunn*, Congress passed H.R. 1158. As originally introduced, H.R. 1158 would also have expressly amended the Act to prohibit discrimination in providing insurance, but this amendment was deleted by the House Judiciary Committee before any action on the bill was taken by Congress as a whole. *See*, H.R. Rep. 100-711, 100th Cong., 2d Sess. 12 (1988). There is little legislative history regarding this provision. When a companion Senate bill (S. 558) was introduced on the same day as H.R. 1158, one of its sponsors explained that the provision would "reaffirm" case law which already construed the Act to prohibit such discrimination. *See*, 133 Cong. Rec. 2261 (February 19, 1987). The House Report listed the removal of "reference to hazard, mortgage and title insurance" among the changes made to the bill. The bill passes as the Fair Housing Amendments Act of 1988.

In the absence of relevant comments in the history, little can be learned from congressional failure to incorporate a specific change into an amendment scheme.

> Proposed legislation can fail for many reasons. Some Members of Congress may oppose the proposal on the merits; others may think it unnecessary and therefore not worth the political capital needed to write the 'clarification' into the statute over opposition; still others may be indifferent or seek to use the bill as a vehicle for some unrelated change. Congress may run out of time, as a noncontroversial bill still sits in a queue while a contentious proposal is debated.

American Family, 978 F.2d at 299.

Changes not made by a subsequent amending legislature are not helpful in determining the intent of the Congress that did enact the statute.

On the other hand, Congress gave HUD the authority to promulgate regulations after HUD had consistently made it clear that it considered insurance redlining an action in violation of the Fair Housing Act. *Id.* at 300. In such an instance, the subsequent legislative action gives greater credence to the interpretation of the statute by the agency. *See, Commodity Futures Trading Commission v. Schor,* 478 U.S. 833, 846 (1986).

Nationwide also argues that an application of the Fair Housing Act to the business of insurance would be violative of the McCarran-Ferguson Act, 15 U.S.C. Sec. 1012(b). Nationwide claims that McCarran preemption should apply to invalidate insurance regulation under the Fair Housing Act because the Fair Housing Act does not specifically relate to the business of insurance, and because underwriting standards constitute the core of insurance. Nationwide also contends that McCarran should cause Ohio law to preempt federal law because Ohio already regulates insurance, and the Fair Housing Act, as well as the regulation at issue, would otherwise operate to disrupt the application of Ohio law.

The McCarran Act provides that, "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, . . . unless such Act specifically relates to the business of insurance."

The McCarran Act is to be narrowly construed in order to avoid interference with valid federal regulatory

interests. *Securities and Exchange Commission v. Republic National Life Insurance Co.*, 378 F.Supp. 430, 436 (S.D.N.Y. 1974); *see also, Cochran v. Paco*, 606 F.2d 460, 467 (5th Cir. 1979). The Fair Housing Act espouses such a valid interest, in that it promotes a "policy that Congress considered to be of the highest national priority". *Trafficante*, 409 U.S. at 211. McCarran "does not preclude federal regulation of the business of insurance." *Dunn*, 472 F.Supp at 1111.

Nationwide nonetheless argues that conflict does exist between the Ohio Insurance Code and the federal law at issue. Nationwide contends, first of all, that the Ohio Insurance Code mandates what it calls "fair discrimination" between insurance risks, in contradiction to the federal provisions prohibiting discrimination. Nationwide also contends that the Seventh Circuit, and therefore this Court, read the McCarran conflict too narrowly to include only direct conflict. Nationwide also alleges that conflict between the HUD regulation and the Ohio Insurance Code arises because the HUD regulation prohibits insurers from considering environmental risks in evaluating insurance risks. Finally, Nationwide contends that conflict between state and federal law exists because of a difference in the remedies available and in the procedures followed in seeking that remedy.

Certainly, all but the last of the McCarran elements is satisfied. The Fair Housing Act does not specifically relate to the business of insurance. However, the fact that a federal statute does not "specifically state that [its] provisions are applicable to insurance" is not alone enough to effect McCaran preemption. *Hamilton Life Insurance Co. v. Republic National Life Insurance Co.*, 408 F.2d 606, 611 (2nd Cir. 1969). The presence of a general

regulatory scheme does not show that any particular state law would be invalidated, impaired or superseded by the application of the Fair Housing Act. *Mackey*, 724 F.2d at 421. Thus, courts have examined the congressional purpose of the McCarran-Ferguson Act and have concluded that the Act does not prevent the application of various federal civil rights statutes.

Congress did not intend by enacting the McCarran-Ferguson Act to limit applicability of its statutes unless the statute would invalidate, impair, or supersede state insurance regulation. *Hamilton Life Insurance Co. of New York v. Republic National Life Insurance Co.*, 291 F.Supp. 225, 229 (D.C.N.Y. 1968), *aff'd*, 408 F.2d 696 (2nd Cir. 1969). This Court, again, has already addressed the issue whether the McCarran Act prohibits regulation of insurance under the Fair Housing Act, as well as HUD's promulgation and enforcement of an anti-redlining regulation. At this Court's last visit to the issue, the Court stated that it would not be improper to allow suit against a homeowner's insurance provider because the Fair Housing Act "does not prohibit anything that [Ohio Revised Code] Sec. 3901.21 permits." *McDiarmid*, 604 F.Supp. at 109.

Nationwide argues nevertheless that conflict does exist between the HUD regulation and the Ohio Insurance Code. Nationwide points to the Ohio requirement of, in Nationwide's words, "fair discrimination" between insurance risks. In its choice of terminology, Nationwide has created a confusion that need not exist. In support of its "fair discrimination" requirement, Nationwide refers to the Ohio Insurance Code's definition of an "unfair or deceptive act", as follows:

> Making or permitting an unfair discrimination between individuals of the same class and essentially the same hazards . . . in underwriting standards and practices or eligibility requirements.

O.R.C. Sec. 3901.2(M).

"To discriminate" in the sense of exercising discernment in evaluating wishes simply does not have the same meaning as does "to discriminate" in the context of civil rights legislation. The Fair Housing Act, and the resulting regulation at issue, forbids discrimination as it is used in the context of civil rights, and it does not forbid discernment. *See, Aloqaili v. National Housing Corp.*, 743 F.Supp. 1264, 1269 (N.D.Ohio 1990) (the issue is "whether a particular defendant committed the proscribed activity *because* of race." (emphasis in original)). The Ohio Insurance Code mandates only discernment in evaluating insurance risks. Ohio does not require that insurers discriminate; in fact, Ohio forbids discrimination:

> It shall be unlawful to . . . [d]iscriminate against any person . . . in furnishing facilities, services, or privileges in connection with the ownership, occupancy, or use of any housing accommodations, including the sale of fire, extended coverage, or homeowner's insurance, because of race . . . or because of the racial composition of the neighborhood in which the housing accommodations are located.

O.R.C. Sec. 4114.02(H)(4); *accord, Aloquaili*, 743 F.Supp. at 1272 (finding that the Ohio provision is *in pari materia* with the Fair Housing Act and that they should therefore

be construed similarly). Certainly, there can be no reasonable argument that a federal regulation prohibiting insurance redlining conflicts with a state statute prohibiting the same practice. Duplication is not conflict. *American Family,* 978 F.2d at 295. The two pieces of legislation can co-exist without conflict and there is no substantive conflict for the McCarran preemption to resolve.

Nationwide argues that a conflict between federal and state law arises because the HUD regulation prohibits insurers from considering environmental hazards if consideration or [sic] environmental hazards would result in racially disparate impact. Nationwide argues further that to do so would be to engage in reverse discrimination prohibited by the Ohio Insurance Code.

It is true that:

> The insurance industry has traditionally classified risks. If insurance premiums are to remain at reasonable levels for most householders, some insurers must be permitted to reject risks which are perceived to be excessively high, while charging higher premiums on some risks than upon others.

Mackey, 724 F.2d at 423.

Both *Dunn* and the Ohio Insurance Code recognize this. For the purposes of *Dunn,* insurance redlining was defined as "the restriction of insurance based on the racial composition of the neighborhood, *apart from any consideration of risk. Dunn,* 472 F.Supp. at 1117 n.3 (emphasis supplied). Nationwide admits that consideration of such factors as the condition of the property, the availability of fire protection, the loss experience for

properties in the same condition, and other similar environmental hazards is consistent with Ohio law. The Fair Housing Act does not preclude consideration of these factors, and Nationwide is free to include any non-discriminatory environmental factors in its application evaluation process. HUD's regulation, as well as Ohio law, simply make it clear that an individual's race, or the racial mix of a neighborhood, is not a proper environmental factor to consider in determining whether to issue insurance.

Nationwide also argues that conflict exists because the Fair Housing Act has different remedies provisions than does the Ohio Insurance Code. In support of this contention, Nationwide alleges that the availability in the Fair Housing Act of private civil remedies allows a claimant to bypass the administrative procedures outlined in the Ohio Insurance Code. Nationwide claims that the threat of federally-available punitive damages will cause insurers to disregard the Ohio "fair discrimination" standard by disregarding these environmental hazards. Neither argument is sufficient to support the contention that McCarran should cause the state law to preempt the federal law.

The Seventh Circuit addressed the issue of additional remedies in *American Family* by pointing out that:

> In the main, federal regulation of a subject – even thoroughgoing federal regulation – does not prevent states from adding remedies to the arsenal established by federal law. The McCarran-Ferguson Act is a form of inverse preemption, so principles defining when state remedies conflict (and so are preempted by) federal law

> are pertinent in deciding when federal rules invalidate, impair, or supersede state rules.

American Family, 978 F.2d at 296.

The presence of additional remedies is not enough of a conflict to negate the operation of federal law under McCarran.

McCarran preemption is also not required because of Ohio's administrative procedure for addressing discrimination claims. In *American Family*, a policy underlay the Wisconsin law being compared to the Fair Housing Act, to the effect that "enforcement of administrative rules defining unfair practices is for administrative officials. *American Family*, 978 F.2d at 302. Prior acknowledgment of this state law policy did not prevent the Seventh Circuit from concluding that the judgment of the district court should be "reversed to the extent that it holds that the Fair Housing Act is inapplicable to property and casualty insurance. . . . " *Id.* at 302. Equally clearly, then, a difference in the process through which a claimant seeks a remedy is also insufficient to invoke McCarran preemption.

Nationwide argues that HUD's interpretation of the Fair Housing Act cannot "be squared with Congressional passage of [the Urban Property Protection and Reinsurance Act ("UPPRA"), 12 U.S.C. Sec. 1749bbb, *et seq.*]," which authorized state FAIR plans for making insurance available to properties unable to qualify for coverage in the standard insurance market. Nationwide's position seems to be that since Title VIII and UPPRA were passed in the same year (1968), Congress intended that those who are unable to obtain homeowner's insurance because

of racial discrimination by private carriers cannot challenge such practices under the Fair Housing Act because they will get their insurance under a "FAIR plan.

The Fair Housing Act and UPPRA were enacted to serve different legislative goals: UPPRA "was enacted to protect private insurance companies from the risk of catastrophic losses which resulted from riots or civil disturbances" and "does not expressly address the issue of discriminatory insurance redlining based on race . . . [which] is the especial province of the Fair Housing Act." *Dunn*, 472 F.Supp. at 1111. The *Dunn* court rejected the very same argument which Nationwide raises here.

In addition, the federal oversight of FAIR plans expired on November 30, 1985, *see*, Pub.L.No. 98-181, Title IV, 452(b)(1), 12 U.S.C. Sec, 1749bbb(b)(1), long before HUD issued the regulation at issue. It would make little, if any sense, for HUD to have deferred to a federal program no longer in effect.

In its complaint, Nationwide also alleges that HUD's determination that the Act bestows on it the authority to investigate claims involving racially discriminatory practices constitutes an unlawful delegation of legislative authority. Nationwide also alleges that HUD's exercise of authority to enforce the Fair Housing Act against insurers is violative of Nationwide's due process rights under the United States Constitution.

Congress specifically empowered HUD to adopt rules implementing the Fair Housing Act, 42 U.S.C. Sec. 3610. As discussed above, HUD's interpretation of the extent of its rulemaking power is both reasonable and

correct. Therefore, there is no unlawful delegation of lawmaking authority.

The Fair Housing Act also authorized HUD to conduct investigations of discriminatory conduct, requiring only that the Secretary give "public notice and opportunity for comment." 42 U.S.C. Sec. 3514(a). A Proposed Rule appeared in 53 Fed.Reg. 44992 (November 7, 1988). As originally proposed, section 100.70 of the implementing regulations did not include as unlawful conduct the refusal to provide hazard or property insurance. However, the Preamble to the Proposed Regulation clearly states the Secretary's interpretation of the Act:

> In view of the broad reach of the "otherwise make available" language in the Fair Housing Act, it is especially important to note that the illustrations in this subpart are only examples of discriminatory conduct and are not intended to limit the scope of discrimination in housing made unlawful under the Act. For instance, although not set forth as an example in this subpart, discrimination in the provision of services and facilities which are prerequisites to obtaining dwellings, including discriminatory refusals to provide . . . adequate property or hazard insurance . . . has been interpreted by the Department and by courts to render dwellings unavailable under the "otherwise make unavailable" language in the Fair Housing Act.

53 Fed. Reg. 44997.

The final regulation issued after the comment period had expired and the final version of the regulation included discriminatory refusals to provide insurance. 24 C.F.R. Sec. 100.70(d)(4). The Preamble to the final version

of the regulation explained that coverage extended to insurers was moved from the proposal's Preamble to the final text for the purpose of making this extension of coverage more clear. 25 C.F.R. Ch.1, Subch. A, App. 1, pp. 550-51. If the Preamble to the Proposed Regulation did not alert insurers to the fact that HUD would be expecting them to comply with its provisions, the actual inclusion in the regulation certainly should have done so.

With all of the foregoing in mind, this Court concludes that the spirit and conclusions reached in the earlier cases which presented these issues to this Court are and should be considered viable and should therefore remain intact. The analyses and results found in *Dunn*, *McDiarmid*, and *Pierce*, coupled with the Seventh Circuit's recent decision in *American Family* convince this Court that HUD's anti-redlining regulation is valid and enforceable.

I conclude that there is no genuine issue of material fact and that HUD is entitled to judgment as a matter of law.

V. REMAINING PENDING MOTIONS

1. Plaintiffs' Motion to Strike

On October 15, 1992, the Dayton Defendants filed a Motion for Protective Order with respect to the taking of certain depositions. (Doc. 74). Subsequently, Nationwide filed a Motion to Strike, or in the Alternative, [a] Response in Opposition to the Dayton Defendants' motion. (Doc. 76). On October 19, 1992, District Judge Walter Rice, to whom this case was first assigned when it

was transferred to this Court, granted Defendants' motion for protective order. *See,* Doc. 74. Accordingly, Nationwide's Motion to Strike, (Doc. 76) is denied as moot.

2. HUD's Motion for Protective Order

On November 10, 1992, HUD filed a Motion for Protective Order and Application for Stay. (Doc. 80). HUD's motion essentially goes to the issue of continued discovery in this litigation. The issue has been fully briefed by the parties. (*Id.* Doc. 82, 87).

The Federal Rules vest broad discretion in the trial court with respect to discovery. *See, Ghandi v. Police Department of City of Detroit,* 747 F.2d 338, 354 (6th Cir. 1984). A district court decision to limit discovery will be reviewed only for an abuse of discretion resulting in substantial prejudice. *Id.*

Rule 26(c) of the Federal Rules of Civil Procedure permits courts to "make any order which justice requires to protect a party or person from . . . undue burden or expense . . . including . . . that discovery not be had [or] that the discovery may be had only on specified terms and conditions . . . " Fed R.Civ.P. 26(c).

As noted above, the issues presented to this Court are purely legal in nature. The record before the Court is sufficiently complete for the Court to make a determination as to the legal questions presented. Accordingly, at this stage of the litigation, there does not appear to be need for any further discovery. Any continued discovery would simply result in the parties being subjected to

undue burden and expense. Therefore, HUD's Motion for Protective Order, (Doc. 80), is granted.

3. Dayton Defendants' Motion for Extension of Time

On December 14, 1992, the Dayton Defendants filed a Motion for Extension of Time to Respond to Plaintiff's Motion for Summary Judgment. (Doc. 88). The motion is unopposed.

In view of the fact that the Dayton Defendants responded to Plaintiff's motion for summary judgment, *see*, Doc. 95, the Dayton Defendants' Motion for Extension of Time is denied as moot.

VI. CONCLUSION

For all of the foregoing reasons, it is ORDERED that:

1. The Dayton Defendants' Motion for Reconsideration, (Doc. 108), is DENIED;

2. Plaintiff's Motion to Strike, (Doc. 76), is DENIED as moot;

3. HUD's Motion for Protective Order, (Doc. 80), is GRANTED;

4. The Dayton Defendants' Motion for Extension of Time, (Doc. 88), is DENIED as moot.

5. Plaintiff's motion for hearing on Defendants' motions to dismiss, (Doc. 26), is DENIED as moot;

In addition, for all of the foregoing reasons, it is recommended that:

1. Defendant HUD's various Motion[s] to Dismiss (Doc. 20, 57, 109), be denied;

2. The Dayton Defendants' various Motion[s] to Dismiss, (Doc. 19, 56) be granted;

3. Plaintiff's Motion for Summary Judgment, (Doc. 84), be denied;

4. Defendant HUD's Motion for Summary Judgment, (Doc. 93), be granted.

5. The Dayton Defendant's Motion for Summary Judgment, (Doc. 92), be denied as moot.

September 27, 1993. /s/ Michael R. Merz
Michael R. Merz
UNITED STATES
MAGISTRATE JUDGE

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON**

NATIONWIDE MUTUAL INSURANCE COMPANY, et al.,	Case No. C-3-92-52
Plaintiff(s),	District Judge Sandra S. Beckwith
-vs-	Magistrate Judge Michael R. Merz
HENRY CISNEROS, SECRETARY OF DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, et al.,	
Defendant(s).	

ERRATA TO REPORT AND RECOMMENDATIONS
(Filed Sept. 30, 1993)

It has come to my attention that there is a typographical error contained in my September 27, 1993, Report and Recommendations in this case. (Doc. 117).

In the paragraph which begins at the bottom of page 32 of the Report, the word "risks" shall be substituted for the word "wishes" so that the sentence reads:

> "To discriminate" in the sense of exercising discernment in evaluating risks simply does not have the same meaning as does "to discriminate" in the context of civil rights legislation. . . .

/s/ Michael R. Merz
Michael R. Merz
UNITED STATES
MAGISTRATE JUDGE

Date: SEP 30 1993

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO WESTERN DIVISION AT DAYTON

NATIONWIDE MUTUAL INSURANCE COMPANY, et al.,	Case No. C-3-92-52
Plaintiff(s),	District Judge Sandra S. Beckwith
-vs-	Magistrate Judge Michael R. Merz
HENRY CISNEROS, SECRETARY OF DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, et al.,	
Defendant(s).	

CORRECTIONS TO REPORT AND RECOMMENDATIONS
(Filed Oct. 13, 1993)

This case is before me on Defendant Cisneros' Motion for Correction of Report and Recommendation[s], (Doc. 121).

On September 27, 1993, I issued a Report and Recommendations recommending, *inter alia*, that Defendant's Motion for Summary Judgment be granted and Plaintiff's Motion for Summary Judgment be denied. (Doc. 17). In discussing, analyzing, and rejecting Plaintiff's argument that Defendant's interpretation of Section 804 of the Fair Housing Act, 42 U.S.C. Sec. 3604, did not render Section 805 of the Act superfluous, I referenced the original language of Section 805, which was amended by enactment

of the Fair Housing Amendments Act, which became effective March 12, 1989. *See*, 42 U.S.C. Sec. 3605.

The amended language of Section 805 reads as follows:

> Sec. 3605. Discrimination in residential real estate-related transactions
>
> (a) In general
>
> It shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction or in the terms or conditions of such transaction, because of race, color, religion, sex, handicap, familial status, or national origin.
>
> (b) Definition
>
> As used in this section, the term "residential real estate-related transaction" means any of the following:
>
> (1) The making or purchasing of loans or providing other financial assistance –
>
> (A) for purchasing, constructing, improving, repairing, or maintaining a dwelling; or
>
> (B) secured by residential real estate;
>
> (2) The selling, brokering, or appraising of residential real property.
>
> (c) Appraisal exception
>
> Nothing in this subchapter prohibits a person engaged in the business of furnishing

> appraisals of real property to take into consideration factors other than race, color, religion, national origin, sex, handicap, or familial status.

42 U.S.C. Sec. 3605.

It would strain language past the breaking point to treat property or casualty insurance as "financial assistance" – let alone as assistance "for purchasing . . . a dwelling". *N.A.A.C.P. v. American Family Mutual Insurance Co.*, 978 F.2d 287, 297 (7th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 2335 (1993). Insurers do not subsidize their customers or act as channels through which public agencies extend subsidies. *Id.* They do not "assist" customers even in the colloquial sense that loans are "assistance" (a lender advances cash with repayment deferred). *Id.* Payment runs from the customer to the insurer. *Id.* Insurance is not more "financial assistance" than a loaf of bread purchased at retail price in the supermarket is "food assistance" or a bottle of aspirin bought from a druggist is "medical assistance." *Id.*

The above quoted language of Section 805 does not change my conclusion that HUD's interpretation of Section 804 does not render Section 805 superfluous. Section 805 of the Act is intended to provide examples of forbidden practices with respect to financial assistance as that assistance relates to, *inter alia*, purchasing a dwelling. It certainly does not provide an exclusive list of prohibited practices that would render the "otherwise make unavailable or deny" language of the statute superfluous. Conversely, the fact that Congress chose to specifically identify in Section 805 the area of financial assistance as one of the areas in which discrimination is prohibited by

the Act does not render the "otherwise make unavailable or deny" language of Section 804 superfluous.

For the foregoing reasons, Defendant Cisneros' Motion for Correction of Report and Recommendation[s] is well taken and is hereby GRANTED. Accordingly, my September 27, 1993, Report and Recommendations, Doc. 117 at 27, is hereby corrected to reflect the above referenced language of Section 805 of the Fair Housing Act, 42 U.S.C. Sec. 3605.

/s/ Michael R. Merz
Michael R. Merz
UNITED STATES
MAGISTRATE JUDGE

Date: 10/18/93

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Nationwide Mutual Insurance Company, et al.,	)	
Plaintiffs,	)	Case No. C3-92-52
v.	)	
Henry Cisneros, Secretary, Department of Housing and Urban Development, et al.,	)	
Defendants.	)	

MEMORANDUM AND ORDER

(Filed Feb. 24, 1994)

This matter is before the Court to consider the Report and Recommendations issued by Magistrate Judge Merz on September 27, 1993. In response to a motion from one of the Defendants in this action, Magistrate Judge Merz corrected his Report and Recommendations on October 18, 1993. In this action, the Plaintiffs, the Nationwide Mutual Insurance Company and Nationwide Mutual Fire Insurance Company (collectively "Nationwide"), seek declaratory and injunctive relief from attempts by the Department of Housing and Urban Development ("HUD") to enforce certain sections of the Fair Housing Act, 42 U.S.C. § 3601, *et seq.* Defendant HUD is responsible for the administration of the Fair Housing Act.

Nationwide also seeks declaratory and injunctive relief from attempts by Defendants, Jerald L. Steed, Charles Brown, and the city of Dayton (the "Dayton

Defendants"), to prohibit certain of Nationwide's practices under the laws of the state of Ohio and Dayton municipal law. Jerald L. Steed is the Executive Director of the Dayton Human Relations Council ("DHRC"), and Charles Brown is the Chairperson of the DHRC Board. Both Defendant Steed and Defendant Brown assist HUD in the local administration of housing discrimination complaints.

This matter pertains to the practice of "redlining" in the insurance business. Redlining involves the charging of higher rates or declining to write insurance for people who live in particular areas. In this action, Nationwide seeks a declaratory judgment that HUD and DHRC lack the authority to regulate the provision and cancellation of homeowners' insurance. Additionally, Nationwide seeks injunctive relief preventing the Defendants' attempts to enforce insurance regulations.

In his Report and Recommendations Magistrate Judge Merz ORDERED that:

> (1) the Dayton defendants' motion for reconsideration is DENIED;
>
> (2) the Plaintiff's motion to strike is DENIED as moot;
>
> (3) HUD's motion for a protective order is GRANTED;
>
> (4) the Dayton defendants' motion for an extension of time is DENIED as moot; and
>
> (5) the Plaintiff's motion for a hearing on the Defendants' motions to dismiss is DENIED as moot;

Additionally, in his Report and Recommendations, Magistrate Judge Merz recommended that:

> (1) Defendant HUD's various motions to dismiss be DENIED;
>
> (2) the Dayton defendants' various motions to dismiss be GRANTED;
>
> (3) the Plaintiff's motion for summary judgment be DENIED;
>
> (4) Defendant HUD's motion for summary judgment be GRANTED; and
>
> (5) the Dayton defendants' motion for summary judgment be DENIED.

On October 28, 1993, Nationwide filed objections to the Report and Recommendations of Magistrate Judge Merz, and the Defendants have responded to Nationwide's objections. Accordingly, this case is ripe for decisions on Nationwide's various objections. Pursuant to Rule 72(a) of the Federal Rules of Civil Procedure, Nationwide has objected to the following:

> (1) Magistrate Judge Merz' conclusion that "HUD's interpretation of the Fair Housing Act is correct;"
>
> (2) Magistrate Judge Merz' conclusion that HUD's "interpretation of the Fair Housing Act . . . is one to which judicial deference is to be accorded under *Chevron*;"
>
> (3) Magistrate Judge Merz' conclusion that the McCarran-Ferguson Act does not preempt application of the Fair Housing Act to the business of insurance; and

> (4) Magistrate Judge Merz' recommendation that the Dayton Defendants' motion to dismiss be granted on the ground "that the Court should decline to exercise its supplemental jurisdiction over Nationwide's state law claims".

The Court first notes that Nationwide's present objections simply repeat arguments made previously by Nationwide, and that Magistrate Judge Merz has already thoroughly discussed the deficiencies underlying Nationwide's objections. Moreover, the Court notes that the precedents set in this circuit and others circuits are contrary to the arguments of Nationwide.

Pursuant the Fair Housing Act, it is unlawful:

> [t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make available or deny, a dwelling to any person because of race . . .

and it is unlawful:

> [t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services . . . in connection therewith, because of race . . .

42 U.S.C. Sections 3604(a) and (b). Pursuant to this statute, HUD has defined as prohibited conduct "[r]efusing to provide . . . property or hazard insurance for dwellings or providing such . . . insurance differently because of race." 24 C.F.R. Section 100.70(a)(4). In essence, Nationwide asserts that HUD has exceeded its authority under the Fair Housing Act to regulate Nationwide's insurance underwriting practices. HUD, however, argues that it has

been delegated authority under the Fair Housing Act to regulate Nationwide's insurance underwriting practices.

The Court first finds that pursuant to *Chevron*, HUD's interpretation of the Fair Housing Act is reasonable and entitled to substantial deference. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-3 (1984). Although Nationwide asserts that *Chevron* is inapplicable since HUD's interpretation does not involve a "technical determination," this Court notes that Judge Merz aptly observed that *Chevron* does not indicate that its holding is limited to its factual situation. Additionally, the Sixth Circuit Court of Appeals has found that deference to an agency's interpretation of a statute is appropriate if such an interpretation "involves the reconciliation of conflicting policies." *Wayside Farm, Inc. v. HHS*, 863 F.2d 447, 451 (6th Cir. 1988). Accordingly, the Court finds that the holding of *Chevron* is not restricted to the technical determinations of an agency.

Moreover, the Court finds that Nationwide has not demonstrated that Congress would not have sanctioned HUD's interpretation of the statute. Under *Chevron*, for a court to determine that an agency's regulations exceed its statutory authority, Congressional intent must be "clear" and "unambiguously expressed." *Chevron*, 467 U.S. at 842-3. The Court finds that Nationwide has failed to demonstrate that Congressional intent on this issue is "clear" and "unambiguously expressed."

Additionally, the Court agrees with Magistrate Judge Merz that HUD's interpretation of the Fair Housing Act does not conflict with the McCarran-Ferguson Act, 15

U.S.C. Section 1012(b). Nationwide contends that applying the Fair Housing Act to the business of insurance violates the McCarran-Ferguson Act. The McCarran-Ferguson Act states, in pertinent part: "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, . . . unless such Act specifically relates to the business of insurance."

However, courts have found that the McCarran-Ferguson Act should be narrowly interpreted in order to avoid conflict with valid federal regulatory interests. *See Cochran v. Paco*, 606 F.2d 460, 467 (5th Cir. 1979); and *Securities and Exchange Commission v. Republic National Life Insurance Co.*, 378 F.Supp. 430, 436 (S.D.N.Y. 1974). The Court notes that Congress through its enactment of the Fair Housing Act has advanced just such a valid interest, as the Act itself promotes a "policy that Congress considered to be of the highest national priority." *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 211 (1972). Thus, the Court concludes that the application of the Fair Housing Act to the business of insurance does not violate the McCarran-Ferguson Act.

Also, Nationwide argues that HUD's interpretation impairs or supersedes the insurance law of Ohio which prohibits unfair discrimination due to the threat of federal disparate impact suits. The Court, however, agrees with the analysis provided by the Seventh Circuit Court of appeals that since the Fair Housing Act only prohibits racial discrimination, "[r]isk discernment is not race discrimination" and "[n]othing in the nature of insurance implies that hazard insurers need to engage in disparate treatment to draw lines on the basis of race rather than

risk." *NAACP v. American Family Mutual Insurance Co.*, 978 F.2d 287 (7th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 2335 (1993). This Court thus concurs with Magistrate Judge Merz that HUD's interpretation does not impair or supersede the insurance law of Ohio which prohibits "unfair discrimination" due to the threat of federal impact suits. Moreover, as noted by Magistrate Judge Merz, the "presence of additional remedies is not enough of a conflict to negate the operation of federal law under McCarran" and "a difference in the process through which a claimant seeks a remedy is also insufficient to invoke McCarran preemption", relying upon *American Family*.

Nationwide additionally contends that a challenge to racially discriminatory insurance practices under the Fair Housing Act is precluded by Congress' enactment of the Urban Property Protection and Reinsurance Act ("UPPRA"), 12 U.S.C. § 1749bbb, *et seq.* In essence, Nationwide asserts that the only way to harmonize the enactment of the two statutes by Congress in the same year is to conclude that the Fair Housing Act was never intended to reach the business of insurance. The Court, however, agrees with HUD that the since the statues were enacted to serve very different legislative goals, no conflict exists. *See Dunn v. Midwestern Indemnity Mid-American Fire and Casualty*, 472 F. Supp. 1106, 1111-2 (S.D. Ohio 1979) (Rubin, J.).

Finally, Nationwide objects to Magistrate Judge Merz' recommendation that this Court decline to exercise its supplemental jurisdiction over Nationwide's state law claims. Where federal issues are dismissed before trial,

district courts should decline to exercise pendent jurisdiction over state law claims. *Gaff v. Federal Deposit Insurance Corp.*, 814 F.2d 311, 319 (6th Cir. 1987) (citing *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966)). Accordingly, the Court declines to exercise pendent jurisdiction over Nationwide's state law claims.

In view of the preceding and in view of the analysis provided by Magistrate Judge Merz and the analysis provided by the Defendants in their memoranda, this Court hereby ADOPTS the Report and Recommendations of Magistrate Judge Merz of September 27, 1993, as corrected by Magistrate Judge Merz on October 18, 1993. This matter is hereby DISMISSED in its entirety.

IT IS SO ORDERED.

/s/ Sandra S. Beckwith
Sandra S. Beckwith
United States
District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

NATIONAWIDE [SIC] MUTUAL INSURANCE COMPANY, et al

v.

HENRY CISNEROS, SECRETARY DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, et al

JUDGMENT IN A CIVIL CASE

(Filed Febr. 24, 1994)

Case Number: C-3-92-52

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the matter is dismissed in its entirety.

Kenneth J. Murphy
Clerk

February 24, 1994
Date

/s/ Illegible
(By) Deputy Clerk

No. 94-3296

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATIONWIDE MUTUAL INSURANCE COMPANY, ET AL., Plaintiffs-Appellants,	)	ORDER (Filed Aug. 4, 1995)
v.	)	
HENRY CISNEROS, SECRETARY OF THE UNITED STATES DEPARTMENT OF HOUSING & URBAN DEVELOPMENT, ET AL., Defendants-Appellees.	)	

BEFORE: KENNEDY and MILBURN, Circuit Judges; and WISEMAN,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is

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* Hon. Thomas A. Wiseman, Jr., United States Judge for the Middle District of Tennessee, sitting by designation.

denied. Judge Kennedy would grant rehearing for the reasons stated in her dissent.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

The Urban Property Protection and Reinsurance Act, 12 U.S.C. § 1749bbb, *et seq.* (excerpts):

§ 1749bbb-3. FAIR plans

(a) Cooperation by insurers with State insurance authorities

Each insurer reinsured under this subchapter shall cooperate with the State insurance authority in each State in which it is to acquire such reinsurance in establishing and carrying out statewide plans to assure fair access to insurance requirements (FAIR plans).

(b) Approval and administration of plans; provisions of plan

Such plans must be approved by, and administered under the supervision of, the State insurance authority, or be authorized or required by State law, and shall be designed to make essential property insurance more readily available in, but not necessarily limited to, urban areas. Such plans may vary in detail from State to State because of local conditions, but all plans shall contain provisions that –

> **(1)** no risk shall be written at surcharged rates or be denied insurance coverage for essential property insurance unless there has first been an inspection of the risk, without cost to the owner, by an inspection facility and a determination by the insurer, based on information in the inspection report and other sources, that the risk does not meet reasonable underwriting standards at the applicable premium rate;
>
> **(2)** inspections under the plan may be requested by the property owner or his representative, the insurer, or the insurance agent,

broker or other producer, and such requests need not be made in writing;

(3) the absence of a building owner or his representative during an inspection shall not preclude a tenant seeking insurance from obtaining an inspection under the plan;

(4) following the inspection, a copy of the inspection report shall be promptly sent by the inspection facility to the insurer or insurers, or to an all-industry placement facility referred to under section 1749bbb-4 of this title, as may be designated by the person requesting the inspection;

(5) after the inspection report is received by an insurer, it shall promptly determine if the risk meets reasonable underwriting standards at the applicable premium rate, and shall promptly return to the inspection facility the inspection report and provide an action report setting forth –

(A)(i) the amount of coverage it agrees to write; and if the insurer agrees to write the coverage with a surcharge (if such a surcharge is authorized by the State insurance authority), the improvements necessary before it will provide coverage at an unsurcharged premium rate; and

(ii) the amount of coverage it agrees to write if certain improvements specified in the action report are made; or

(B) the specific reasons it declines to write coverage;

(6) if the insurer declines the risk, or agrees to write the coverage sought on condition

that the property will be improved, it shall also promptly send a copy of both the inspection and action reports to the property owner and the State insurance authority, and at the time the insurer sends such reports to the property owner, it shall also explain his right, under applicable State laws, to appeal the decision of the insurer to the State insurance authority, setting forth the procedures to be followed for such appeal;

(7) all policies written pursuant to the plan shall be promptly written after inspection or reinspection and shall be separately coded so that appropriate records may be compiled for purposes of performing loss prevention and other studies of the operation of the plan;

(8) the inspection facility shall submit to the State insurance authority and to the Director periodic reports setting forth information, by individual insurers, including the number of risks inspected under the plan, the number of risks accepted, the number of risks conditionally accepted and reinspections made, the number of risks declined, and such other information as the State insurance authority may request;

(9) notice will be given to any policyholder a reasonable time prior to the cancellation or nonrenewal of any risk eligible under the plan (except in case of nonpayment of premium or evidence of incendiarism), to allow ample time for an application for new coverage to be made and a new policy to be written under the plan, and the insurer shall, in writing, explain to the policyholder the procedures for obtaining an inspection under the plan in the notice of cancellation or nonrenewal; and

(10) a continuing public education program will be undertaken by the participating insurers, agents, and brokers to assure that the plan receives adequate public attention.

(c) Membership of board of directors, board, etc., for each plan

At least one-third of the voting members of every board of directors, board of governors, advisory committee, and other governing or advisory board or committee for each plan described in subsection (b) of this section shall be individuals who are not employed by, or otherwise affiliated with, insurers, insurance agents, brokers, producers, or other entities of the insurance industry.

The McCarran-Ferguson Act,
15 U.S.C. § 1011, *et seq.* (excerpts):

§ 1012. Regulation by State law; Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948

(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided,* That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act,

and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

The Fair Housing Act, 42 U.S.C. § 3601, *et seq.* (excerpts):

§ 3604. Discrimination in the sale or rental of housing and other prohibited practices

As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful –

> **(a)** To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.
>
> **(b)** To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.

* * *

---

§ 3605. Discrimination in residential real estate-related transactions

(a) In general

It shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin.

(b) "Residental real estate-related transaction" defined

As used in this section, the term "residential real estate-related transaction" means any of the following:

(1) The making or purchasing of loans or providing other financial assistance –

(A) for purchasing, constructing, improving, repairing, or maintaining a dwelling; or

(B) secured by residential real estate.

(2) The selling, brokering, or appraising of residential real property.

* * *

---

§ 3614a. Rules to implement subchapter

The Secretary may make rules (including rules for the collection, maintenance, and analysis of appropriate data)

to carry out this subchapter. The Secretary shall give public notice and opportunity for comment with respect to all rules made under this section.

The Declaratory Judgment Act,
28 U.S.C. § 2201, *et seq.* (excerpts):

§ 2201. Creation of remedy

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

* * *

---

§ 2202. Further relief

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

The Ohio Insurance Code, O.R.C., § 3901.01, *et seq.* (excerpts):

Ohio Rev. Code § 3901.21

(M) Making or permitting any unfair discrimination between individuals of the same class and of essentially the same hazard in the amount of premium, policy fees, or rates charged for any policy or contract of insurance, other than life insurance, or in the benefits payable thereunder, or in underwriting standards and practices or eligibility requirements, or in any of the terms or conditions of such contract, or in any other manner whatever.

* * *

Ohio Rev. Code § 3929.43 Ohio fair plan underwriting association.

(A) The Ohio fair plan underwriting association is hereby created consisting of all insurers authorized to write within this state, on a direct basis, basic property insurance or any component thereof in multi-peril policies, to assist applicants in urban areas to secure basic

property insurance or homeowners insurance, and to formulate and administer a program for the equitable apportionment of basic property insurance or homeowners insurance which cannot be obtained in the normal market. Every such insurer shall be a member of the association and shall remain a member as a condition of its authority to write any of such insurance in this state.

(B) The association, pursuant to sections 3929.41 to 3929.49 of the Revised Code, and the plan of operation, with respect to basic property insurance or homeowners insurance, may assume and cede reinsurance on insurable risks written by its members.

(C) The board of governors of the association shall submit to the superintendent of insurance, for his approval, a proposed plan of operation which shall provide for economical, fair, and nondiscriminatory administration of a program for the equitable apportionment among members of basic property insurance or homeowners insurance which may be afforded in urban areas to applicants whose property is insurable in accordance with reasonable underwriting standards, but who are unable to procure such insurance through normal channels. The association is under no obligation to issue basic property insurance or homeowners insurance to any person, unless that person and his property would be insurable in the normal insurance market, and such property, except for its location, would constitute an insurable risk in accordance with reasonable underwriting standards. The plan of operation shall provide that the association, in determining whether the property is insurable, shall give no consideration to the condition of surrounding property or properties, where such condition is not

within the control of the applicant. Rates for basic property insurance shall not exceed those rates filed with the superintendent by the major rating organization in this state, except that in the case of homeowners insurance the association may file deviations to the rating plan previously filed by such rating organization, and such deviations shall be subject to the approval of the superintendent in the same manner as other deviations under Chapter 3935. of the Revised Code. The plan of operation may also provide for assessment of all members in amounts sufficient to operate the association, maximum limits of liability per location to be placed through the program, reasonable underwriting standards for determining insurability of a risk, and the commission to be paid to the licensed producer designated by the applicant. The superintendent shall adopt such plan and all amendments thereto pursuant to Chapter 119. of the Revised Code.

If the superintendent disapproves the proposed plan of operation, the board of governors shall, within fifteen days, submit for approval an appropriately revised plan of operation and if the board of governors fails to do so, or if the revised plan submitted is unacceptable, the superintendent shall promulgate a plan of operation.

If amendment of the plan of operation is requested by the superintendent or the board of governors, the board of governors shall submit to the superintendent, for his approval, such amendments. If such amendments are not approved by the superintendent, the board of governors shall, within fifteen days, submit for approval an appropriately revised amendment. If the board of governors fails to do so, or if the amendment is not

approved by the superintendent, the superintendent shall promulgate such amendment as he finds necessary.

(D)(1) The plan of operation may provide for periodic advance assessments against member insurers in amounts considered necessary to cover any deficit or projected deficit arising out of the operation of the association. Any provision in the plan for implementation of such advance assessments shall be approved by the superintendent. Any such provision in the plan shall also provide for quarterly or other periodic installment payment of such assessments.

(2) Such plan shall provide a method whereby member insurers may recoup assessments levied by the association. In order to recoup such assessments the plan may also provide for the calculation and use of rates or rating factors to be applied to direct premiums for basic property insurance and homeowners insurance located in this state. Such a provision is subject to the approval of the superintendent. Member insurers of the association implementing a change in rates pursuant to this section shall file such changes with the superintendent. Such changes shall not increase rates more than the amount authorized by the association and approved by the superintendent pursuant to the plan. The association may consult with member insurers or licensed rating bureaus in connection with the establishment and operation of any such provision.

(E) Any insurer which is a member of the association shall participate in the writings, expenses, profits, and losses of the association in the proportion that its

premiums written bear to the aggregate premiums written by all members of the association, except that this division shall not be construed to preclude the board of governors from taking action to adjust assessments in accordance with a program adopted pursuant to division (I) of this section.

U.S. Department of Housing and Urban Development Regulations, 24 C.F.R. Ch. I

§ 100.70 Other prohibited sale and rental conduct.

(d) Prohibited activities relating to dwellings under paragraph (b) of this section include, but are not limited to:

(4) Refusing to provide municipal services or property or hazard insurance for dwellings or providing such services or insurance differently because of race, color, religion, sex, handicap, familial status, or national origin.

NATIONAL FAIR HOUSING ALLIANCE
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FOR IMMEDIATE RELEASE
MONDAY, SEPT. 11, 1995

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PRESS RELEASE

FAIR HOUSING ACT UNDER SIEGE BY INSURANCE LOBBYISTS

NEW EVIDENCE SHOWS REDLINING ON THE RISE BY NATION'S LARGEST HOME INSURERS: STATE FARM, ALLSTATE & NATIONWIDE

WASHINGTON D.C. – The U.S. Senate today is considering legislation that will prevent all investigations by the U.S. Department of Housing and Urban Development (HUD) of illegal insurance discrimination under the Federal Fair Housing Act. A powerful coalition of insurance lobbyists have persuaded Congress that HUD should be

prohibited from spending any funds for the investigation of insurance discrimination nationwide.

"This comes at a time when there is increasing evidence of the high level of discrimination against African-American and Latino neighborhoods across the country by homeowners insurance providers," said Shanna Smith, Executive Director, National Fair Housing Alliance (NFHA).

The National Fair Housing Alliance is filing with HUD this week amended complaints of discrimination against three of the nation's largest insurance companies: Allstate, State Farm and Nationwide. The complaints are amended to include allegations of discrimination in a total of nine cities across the country. Additional information has become available which reveals that the policies of these companies make millions of homes in African-American and Latino neighborhoods ineligible for homeowners insurance coverage in most major American cities, as well as in our rural communities.

"The effort to exempt discrimination by the insurance industry from the federal fair housing law, if successful, would be the first time in this century that Congress has removed a whole category of discrimination from the reach of the law," said a letter written to Senator Mark Hatfield, Chairman of the Appropriations Committee, by the Leadership Conference on Civil Rights, voicing opposition to the proposed legislation. "Congress will have succumbed to the special pleading of a special interest – the insurance industry. There is absolutely no reason why discrimination in insurance should be treated differently than any other form of discrimination."

Investigations of Allstate, State Farm and Nationwide insurance companies were conducted in nine U.S. cities by African-American, Latino and white investigators. An analysis of these investigations shows that discrimination against African-American and Latino neighborhoods occurred more than 50 percent of the time. The following levels of discrimination were found:

■ Akron, OH	37%
■ Atlanta, GA	67%
■ Chicago, IL	83%
■ Cincinnati, OH	44%
■ Los Angeles, CA	44%
■ Louisville, KY	56%
■ Memphis, TN	32%
■ Milwaukee, WI	58%
■ Toledo, OH	59%

Investigations revealed that minority homeowners who were charged more money for less coverage, were not offered the best insurance policies, and were even denied any type of coverage. Evidence from the investigations showed that the policies of these companies make it impossible for many homeowners, especially those living in urban neighborhoods, to obtain insurance coverage from these companies. For example, Nationwide's exclusion of properties over 30 years old eliminates from coverage 81% of homes in neighborhoods that are more than 50% minority in Chicago and eliminates 87% of homes in Milwaukee's minority neighborhoods.

Funding for investigations has never been more vital, as evidenced by an African-American homeowner who negotiated a settlement against Allstate.

"When asked how it felt to be discriminated against, I recalled the months of agonizing fear that lived with me on a daily basis," said Deborah Quinn-Lucy, of Toledo, Ohio. "My homeowners policy was canceled for no apparent reason other than the fact that I am a Black female. My family and I were disheartened, never knowing from day to day whether flames would engulf our home or a natural disaster would occur."

The neighborhood where Quinn-Lucy lives is well-kept area where predominantly Black residents live who are "proud" of their homes, she said. The pride in their homes is evidenced by the beautifully maintained lawns with exceptional exteriors, she said.

Toledo resident Helen Coury, who is White, said that State Farm would not insure her home because 10 years earlier it had been zoned for commercial business. Ms. Coury maintains that she was denied insurance because she lives in a predominantly African American neighborhood. "I feel that I was redlined," she said. Mr. Coury has filed a complaint with HUD against State Farm. Despite the rejection by State Farm for a $60,000 policy, Coury was able to get her home insured for $95,700 by another company.

The legislation up for review today will have serious implications on whether or not a private citizen can secure redress through HUD for discriminatory insurance practices. If the HUD administrative procedure is eliminated as a mechanism for redress, the ordinary citizen will have to hire private legal counsel to challenge violations of the Federal Fair Housing Act. This legislation, if

passed, will ultimately affect a person's ability to successfully purchase a home in America's older urban neighborhoods. The ability to get replacement coverage insurance is a precondition to getting a mortgage and buying a home. When redlining occurs, all homeowners living in minority neighborhoods are deprived of the opportunity to build and invest in their community.

Property insurance discrimination is illegal under the Federal Fair Housing Act. The U.S. Supreme Court refused to review the ruling by Seventh Circuit Court of Appeals which said HUD has authority to investigate insurance discrimination. (NAACP v American Family Mutual Insurance Company) If the current legislation passes Congress, the result would be an unprecedented disruption to ongoing administrative and legal HUD proceedings. Not only would HUD be prevented from investigating the 28 pending insurance complaints, but HUD could not accept any future Fair Housing Act complaints involving homeowners insurance.

The Leadership Conference on Civil Rights and the National Fair Housing Alliance were joined at a Press Conference announcing these charges today by many supporting organizations, including the NAACP, NAACP-Legal Defense and Educational Fund, the National Puerto Rican Coalition, the National Council of La Raza, People for the American Way, Center for Community Change, and the ACLU.

Because of the nature and scope of the discriminatory practice and policies uncovered in its investigations, NFHA is establishing a HOTLINE to receive insurance discrimination complaints from persons who feel that

they are being denied homeowners insurance or provided inferior coverage because of the racial or ethnic make-up of their neighborhood. People may call the National Fair Housing Alliance toll free at 1-800-910-7315. Agents who believe they are losing business in minority neighborhoods because of the policies of their companies are also encouraged to call.

(LOGO) **INSURANCE BRIEFING** (LOGO)

National Association of Independent Insurers

444 North Capitol Street, NW
Suite 801
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(202) 639-0490

HUD Should Not Be Regulating Property Insurance

HUD's Office of Fair Housing and Equal Opportunity has been devoting substantial resources in an attempt to impose federal regulation on property insurance, allegedly under the Fair Housing Act. For example, to assist it in a proposed rulemaking, HUD has spent more than $435,000 for contract services, some from large law firms, and has included more than $100,000 in its fiscal year 1996 budget. In addition, HUD recently awarded grants of over $2 million to private groups to encourage them to initiate "enforcement" actions against insurers.

The problem here is that Congress never intended for HUD to undertake these activities under the Fair Housing Act, which only governs home sales and rentals and the services that home sellers, landlords, mortgage lenders and real estate brokers provide. ***The Fair Housing Act makes no mention whatsoever of property insurance.*** In fact, a review of the legislative history shows that Congress specifically chose ***not*** to include the sale or underwriting of insurance in the Act.

HUD's action in this area is directly contrary to Congress' decision fifty years ago to reserve insurance regulation to the states. ***In the McCarran-Ferguson Act of 1945, Congress declared that, unless a federal law "specifically***

relates to the business of insurance," that law is not to be deemed applicable to insurance practices. HUD's assertion of authority regarding property insurance flagrantly defies this statutory mandate.

HUD's enforcement and regulatory activities regarding property insurance is also clearly a waste of resources because it duplicates state laws and regulations. ***Every state and the District of Columbia have laws and regulations addressing unfair discrimination in property insurance.*** State legislatures have debated and enacted a wide variety of anti-discrimination provisions to ensure that an insurer does not use race or other improper factors in determining whether to provide a citizen property insurance. These provisions are enforced by state insurance regulators. State are actively investigating and addressing discrimination where it is found to occur. HUD is just adding an unnecessary layer of federal bureaucracy.

Congress has a responsibility to carry out the mandate of the American voters to return government to state and local control. The task is to streamline federal regulatory activities, ***particularly where they duplicate existing state laws and regulations.*** Congress faces many hard choices in working to fulfill its commitment to eliminate unnecessary federal spending and red tape. With respect to HUD, Congress must determine how to preserve essential programs while creating a more efficient federal government and reducing the budget deficit. If there is one area of federal spending where Congress need not struggle to determine whether cutbacks are appropriate, it is HUD's activities regarding property insurance.

U. S. Department of Housing and Urban Development
Washington, D.C. 20410-2000

(LOGO)

August 17, 1995

OFFICE OF THE ASSISTANT SECRETARY (LOGO)
FOR FAIR HOUSING AND EQUAL OPPORTUNITY

Mr. John Lobert
Senior Vice President
National Association of Independent Insurers
Suite 801
444 Capitol Street, NW
Washington, DC 20001

Dear Mr. Lobert:

I am enclosing for your information the report of the Federal Mediation and Conciliation Service (FMCS) evaluating the prospects for utilizing negotiated rulemaking to develop portions of a rule applying the Fair Housing Act to property insurance.

The Department of Housing and Urban Development remains committed to ensuring that no American faces discrimination when seeking property insurance, regardless of race, religion, national origin, sex, handicap, or familial status. However, the results of the FMCS efforts to determine the interest of appropriate parties in the possible negotiation of a fair housing property insurance rule have convinced me that such an undertaking is inadvisable at this time. Furthermore, given the increasingly limited resources of the Office of Fair Housing and Equal Opportunity, I have concluded that further work on rulemaking regarding discrimination in property insurance, such as more public hearings or the dialogue suggested by FMCS, is premature. The Office of Fair Housing

and Equal Opportunity intends instead to await further development of the law applying the Fair Housing Act to property insurance and to use future court decisions to evaluate the need for rulemaking. The Office will continue to carry out its enforcement responsibilities, including investigating complaints and seeking their resolution.

I very much appreciate your participation in the process of gathering the information necessary to advise my decision on this matter and look forward to continuing to work with you on fair housing issues of mutual concern.

Sincerely,

/s/ Elizabeth K. Julian
Elizabeth K. Julian
Acting Deputy Assistant
Secretary for Policy
and Initiatives

Enclosure

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Ira B. Lobel
Commissioner
518-465-2716

Linda L. Myers
Commissioner
708-887-4761

August 3, 1995

John Lobert, Senior Vice President
National Association of Independent Insurers
444 Capitol St., NW, Suite 801
Washington, DC 20001

Dear Mr. Lobert:

Over the last two months, we have spoken to over 25 individuals representing various interests and organizations involved in and affected by in the insurance industry. The main thrust of these conversations was to discuss whether the Department of Housing and Urban Development should initiate a regulatory negotiations on the applicability of the Fair Housing Act to property insurance, focusing on the application of disparate impact, treatment of niche marketing and customer/agency relations.

The report concerning our view of the feasibility of this project is attached. After carefully considering and weighing all of your views, we do not believe it is appropriate to convene a regulatory negotiations for regulations covering insurance and the Fair Housing Act. A full explanation is contained in the enclosed report. As indicated in the report, while we do not believe a regulatory

negotaitons [sic] is appropriate, we do believe that further dialogue would be useful.

During subcommittee consideration of the VA/HUD appropriations bill in the House of Representatives, a rider was added to prohibit the HUD from spending any funds to implement property insurance regulations. Since the final disposition of this bill is unclear, we do not believe it is prudent to go forward with any activity at this time. As soon as Congressional action is clairified [sic], HUD, in cooperation with the conveners and with input from other interested parties, will make a determination as to the appropriateness of moving forward with further dialogue in this area.

Please feel free to contact us if you have any questions or comments.

Sincerely,

/s/ Ira B. Lobel
Ira B. Lobel
Commissioner

/s/ Linda L. Myers
Linda L. Myers
Commissioner

CONVENING REPORT

FOR

REGULATORY NEGOTIATIONS

ON

POSSIBLE

REGULATORY NEGOTIATIONS

FOR

INSURANCE AND FAIR HOUSING ACT

Submitted by:

Ira B. Lobel
Commissioner

Linda L. Myers
Commissioner

Federal Mediation and Conciliation Service

7-21-95

This report contains the conveners' findings and recommendations regarding the feasibility of convening a committee willing to undertake regulatory negotiations to develop a proposed rule for the U.S. Department of Housing and Urban Development (HUD). The purpose of the proposed negotiations would be to develop rules concerning the application of the Fair Housing Act, as amended in 1988, to property insurance, with particular emphasis on the application of disparate impact, treatment of niche marketing and company/agent relationship.

REGULATORY NEGOTIATIONS GENERALLY

Regulatory negotiations have been used in recent years as a means of gathering input for proposed agency rulemaking before a rule is developed. The regulating agency attempts to convene a committee representing interests affected by a proposed rule and then attempts to negotiate the content of the proposed rule. The agency attempts to reach a consensus with these interests concerning the content of the rule. If consensus is reached, the agency develops regulations according to the consensus agreement.

Experience has shown that rules developed in this manner are less subject to litigation than rules proposed without input to the agency. Even if consensus is not reached, the agency has access to significant information that usually makes for a better formulated rule. Once the regulatory negotiations are completed, the agency must go through the normal regulatory process.

Generally, regulatory negotiations are appropriate for issues that are likely to be resolved through negotiations. Subjects for regulatory negotiations must be carefully chosen for areas in which the proposed regulations are the source of significant, but reconcilable controversy. The controversy should not be so strong that chances for avoiding litigation is de minimis.

METHODOLOGY

As with other government agencies, the United States Department of Housing and Urban Development (HUD) is committed to improving the regulatory process. HUD

saw the use of a regulatory negotiations in this area as an opportunity to develop dialogue and obtain input before the publication of a regulation. In 1995, HUD used the reg-neg process successfully on an issue regarding the distribution of Federal funds to public housing authorities under the vacancy rule. Based on the success of the vacancy rule reg-neg, HUD's explored the appropriateness of the reg-neg process for Fair Housing and property insurance.

HUD retained the Federal Mediation and Conciliation Service to explore the feasibility of regulatory negotiations on the three issues mentioned above, to make recommendations as to the make-up of the regulatory negotiations committee and to facilitate the negotiations.

The Federal Mediation and Conciliations [sic] Service (FMCS) is an independent agency of the Federal government established under the National Labor Relations Act of 1947. Its primary mission is the mediation of labor disputes. In recent years, FMCS has become increasingly active in the area of alternative dispute resolution and regulatory negotiations.

FMCS provides mediation, facilitation and other third party assistance to a governmental entity through an interagency agreement. In this situation, FMCS is providing the convening and facilitating service: a) determining whether a regulatory negotiations on this subject is appropriate; b) if appropriate, recommending the composition of the committee; and, c) once the committee is convened, facilitating the negotiations.

FMCS assigned two field mediators to perform this activity: Commissioner Ira B. Lobel from Albany, NY and

Commissioner Linda L. Myers from Chicago, IL. Both have had extensive experience not only in the mediation of labor disputes but also in the regulatory negotiations and other forms of alternative dispute settlement.

The conveners from FMCS first met with officials from the Department of Housing and Urban Development for a briefing on the issues and HUD's perspective as to the scope of the project and the issues to be discussed. HUD prepared a list of major insurance companies, trade associations and advocacy groups active in the field. The conveners then contacted representatives of these organizations by telephone to discuss the feasibility of initiating a regulatory negotiations on the subject, ideas for who should be on a negotiations committee, and, if appropriate, whether the individual organization had interest in participating. These interviews took place throughout the month of June and into July. Those persons and organizations contacted are listed in Appendix A.

BACKGROUND

In determining whether regulatory negotiations in this specific subject area is appropriate, there are several elements to consider: 1) the structure of property casualty insurance industry; 2) products sold; 3) jurisdiction; and 4) other legal and technical concerns.

Structure of Property Casualty Insurance Industry

There are approximately 6,000 insurance companies in the United States. Approximately 3900 of these sell

property insurance with the majority of business written by about 900 companies that operate in most states. Five companies – State Farm, Allstate, Farmers Insurance, USAA and Nationwide – represent over 45% of the homeowners market, with State Farm and Allstate together representing over 1/3 of the market.

Homeowners' property and casualty insurance is sold primarily through agents who either represent several companies (independent agents) or who write for only one company (exclusive agents). Agents conduct much of their business by telephone. Some insurers do not utilize an agency system and market their products by direct mail. Many experts will claim there is little face to face communication between insurers and their customers.

Insurance Product

The price and other terms and conditions under which an insurance product is available varies among consumers. Insurers attempt to spread the risk among various homogenous risk classifications. The classifications may be based on factors such as the construction of the dwelling (e.g. brick or frame), the quality of the fire protection service in the local community, and other underwriting variables. In this way, the risk of financial loss is theoretically spread among several policyholders, with each paying a premium determined by the risk represented by the classification to which the policyholder is assigned.

In order to determine rates and create appropriate classifications, insurers utilize actuaries to analyze loss

experience and other statistical data. Underwriters evaluate individual applications against this actuarial criteria to determine eligibility for and cost of coverage. While an effort is made to objectively analyze risk, subjective judgments are inherent in this analysis. There has been concern by HUD, some insurance companies and advocacy groups that discrimination based on race, color, sex, religion, national origin, familial status or handicap may form the basis for some of these subjective judgments. The extent to which to which [sic] a system which may adversely affect a protected class can override the risk assumptions made by underwriters remains an unsettled legal issue.

Several types of insurance products are sold to insure homes. Most provide coverage against a combination of perils. In addition to "homeowners" multi peril packages for single family homes, insurers provide rental policies, condominium insurance, "special" products for older homes, and other policies.

The type of policy most frequently sold is a full replacement cost homeowners insurance policy. A full replacement cost policy prepays the homeowner the entire cost for repairing or replacing a dwelling that is damaged by the perils covered in the policy. Other policies pay the market value, but not the replacement cost, of damaged property. Such policies are frequently sold in older urban communities where there are significant disparities between the replacement cost and market value of a home.

Following the urban unrest of the 1960s and in response to the problems of insurance unavailability in

many cities, Congress created the FAIR (Fair Access to Insurance Requirements) Plan to make insurance available to consumers who are good risks in areas perceived to be high risk communities. Private insurers who participate in such insurance plans are provided protection against loss because those losses are shared by all participating insurers. FAIR Plans are operated in about half the states and are privately financed. FAIR Plan policies often exclude theft coverage (normally included in homeowners policies) and generally are more expensive than those policies available in the regular insurance market.

Jurisdiction to Regulate

To many of those interviewed, there has been, and continues to be, a major and fundamental legal question as to whether HUD has jurisdiction to regulate in this area. During their interviews, the conveners indicated that the jurisdiction issue would not be negotiated; rather, negotiations would proceed under the assumption that HUD had jurisdiction to regulate in the area. Regardless of the outcome of the negotiations, all participating parties would be free to pursue legal avenues to challenge this assumption. It was made clear that this concept would be stated in any ground rules.

Even with this caveat, some of those interviewed indicated that disagreement on the threshold issue of jurisdiction would preclude them from participation in any negotiations. Even those who believe HUD has jurisdiction agree that there is little question that the issue of jurisdiction will continue to be the subject of litigation until such time as there is a final disposition on the issue.

Regulation of the insurance industry has been primarily a state responsibility. Under the McCarran-Ferguson Act of 1945, Congress exempts insurance companies from federal regulation "to the extent that they are regulated by state law."

Since passage of the Fair Housing Act, there has been a continuous debate as to whether the Act covers property insurance. This debate centers on the fact that insurance is not explicitly referred to in the Act and whether McCarran-Ferguson exempts the industry from this form of federal regulation.

HUD has consistently taken the position that, despite the presence of McCarran-Ferguson, the Fair Housing Act applies to property insurance. The key sections of the Act make it unlawful to "otherwise make unavailable or deny, a dwelling" and prohibit discrimination "in the provision of services or facilities in connection therewith." Proponents of regulation argue that, if a person cannot purchase a home due to the denial of insurance, this denial constitutes a potentially unlawful or discriminatory act under Federal law. In 1989, HUD implemented regulations that specifically provide that discrimination in property insurance is prohibited under the Fair Housing Act. [24 CFR 100.70(d)(4)]

Opponents of regulation maintain that under McCarran-Ferguson, there can be *no* Federal regulation. Several courts have dealt with the issue, but there has been no definitive ruling to date. The most recent case, *Nationwide Mutual Insurance Co v. Cisneros* (6th Circuit, 1995) may be appealed and may give greater guidance on the jurisdiction question.

Legal Concerns

HUD recognizes that the question of jurisdiction could not be resolved through regulatory negotiations. Nevertheless, assuming HUD has jurisdiction to regulate, there are a number of legal concerns that HUD wishes to have addressed in these regulatory negotiations. In its initial meeting with the conveners, HUD articulated its belief that resolution of three issues would address the most difficult aspects of developing a rule on the issue. A number of those interviewed agree with this assessment. These three issues include:

1) Application of disparate impact

2) Treatment of niche marketing

3) Company/agent relations

Much of the controversy in regulating insurance centers on use of a disparate impact, as opposed to disparate treatment, standard in applying the Fair Housing Act to property insurance. While the disparate treatment standard focuses on treating members of a protected class differently from non-members, disparate impact deals with the disproportionately adverse effects of a facially neutral insurance practice on members of a protected class.

A key question in this area simply asks what constitutes an appropriate justification for a policy or practice that may have a disparate impact on a protected class. While HUD would like to see the disparate impact standard incorporated into any rule, many in the insurance industry have a fundamental concern with using this standard.

Some of the concern is based on the existence of state regulations that requires insurance discrimination based on risk. If this standard is required in many state regulations and a disparate impact standard is mandated in Federal regulations, some felt there would be a conflict in the two sets of regulations, making adherence to both impossible. Some of those interviewed believed there would be a question as to which regulation would take priority.

Developing application of an appropriate standard for determining discrimination can be an area for negotiations. Standards of disparate treatment or disparate impact, tests of business necessity or business purpose have all been used at various times in both the Fair Housing Act and other civil rights laws. Determining how any standard is applied could be an area of intense discussion.

Niche marketing refers to the extent to which companies can write insurance in specific regions of the country or geographic areas of a state or for specific occupational groups. The concern is that some companies, in targeting these markets, discriminate against certain protected classes. The insurance industry, on the other hand, is concerned that the method that companies use to market and sell their product could change dramatically. There could be negotiations to determine what is an appropriate "niche" to insure, even if a protected class is excluded. Further negotiations could address potential remedies for dealing with "niche" marketers.

Company/agent relations involves who is responsible for alleged discrimination. One of the issues is a

question of liability: is the agent making the decision or is the company? Other questions involve agency location and visibility that may serve to foster disparate impact for affected classes. These questions will also have an impact on both how companies operate and the extent to which their product is available to protected classes of individuals.

TIMING

In its initial meeting, HUD stated that they would like to have the process completed so that a draft rule could be proposed by January, 1996. This means that the regulatory negotiations would have to be completed by November, 1995. While these target dates are admirable, it is the conveners' opinion that they are unrealistic. To develop rules in an area where none currently exist is a difficult proposition. To do so in a highly controversial setting may be impossible. Assuming that negotiations can start within two months after issuance of this report, at least 4-5 monthly, two day meetings would be necessary to determine whether any progress can be made.

This means that the negotiations would not be completed until mid-winter, 1996 with rules developed by spring, 1996. If progress is being made, negotiations should be allowed to continue despite an existing timetable. Although under ideal circumstances HUD desired a expedited negotiations, HUD was receptive to time extensions if the situation warranted.

FEASIBILITY OF REGULATORY NEGOTIATIONS

HUD should be given credit for exploring the possibility of using a regulatory negotiations to develop rules in this area. The process has been used successfully with a number of governmental bodies to formulate rules that are less subject to attack and litigation and, according to many experts, better formulated rules. It should be noted that these recommendations make *no* inference on the appropriateness of HUD's desire to regulate in this area. The conveners recommendations refer only and specifically to the use of a regulatory negotiations, or a similar process, in the development of regulations regarding Fair Housing and insurance.

There are two principle [sic] purposes of any regulatory negotiations: (1) to gather information on a proposed rule so that when the agency regulates it is better informed and fashions a better rule; and (2) to attempt to reach consensus on the exact nature of the rule. Both elements are important to the success of a regulatory negotiations. The literature indicates, however, that agencies should be cautious in proceeding with a regulatory negotiations when the chances of reaching consensus are small. While information could be gathered that is very useful, the cost and time associated with a reg-neg could be more efficiently used.

In this case, there is a significant threshold issue that must be decided. Industry representatives were consistent in questioning the legal authority of HUD to regulate in the area of insurance and Fair Housing. Even if regulations could be developed that were acceptable to a representative group, there is little question that the

regulations would be challenged on the jurisdiction issue. Since one of the purposes of a reg-neg is to reduce litigation, one could argue that it is an irrational exercise to promote a regulatory negotiations when a judicial challenge to the outcome of the regulations being developed is almost certain.

Even if it is settled that HUD has jurisdiction to regulate in this area, there were questions raised involving the entire issue of state federal relations. Insurance is a highly regulated industry at the state level. Some were concerned that regulations developed at the Federal level could potentially be in conflict with requirements at the state level, putting regulators, insurance companies and advocacy groups in the untenable position of deciding which regulation to follow. Others interviewed maintained that there is no conflict – the issue involves the standards to which a business necessity or business purpose can be used to justify disparate impact. Resolving questions of which set of regulations is applicable would probably be the subject of significant court challenges regardless of the content of the regulations.

Regardless of the above, it appears that there is little receptivity to developing regulatory negotiations at this time on this issue. Many of those interviewed do not believe it is in their best interest to negotiate regulations when they may be able to get more advantageous results through other means, either the courts or Congress.

Accordingly, we are recommending *against* a regulatory negotiations. Nevertheless, initiating a dialogue in a committee format should be useful. The issues of the application of disparate impact and the treatment of

niche marketing are significant issues that should be discussed in a forum that allows the free exchange of ideas and concepts. However, having such an exchange in a regulatory negotiations, whose goal is to develop consensus language, may be extremely costly and time consuming when the potential for success is limited.

Our recommendation would be to develop a public policy dialogue that would discuss the same issues without the intensive effort to reach consensus. The report developed would not be a consensus report, but one that would reflect the topics and basic positions discussed. In the event HUD chooses to adopt this recommendation, we believe representatives from all those organizations interviewed should be invited to meetings to discuss the principle [sic] issues identified by HUD: disparate impact, niche marketing and customer agent relations.

There should be at least two sets of 2 day meetings. At these meetings, very brief and general ground rules would be identified. Discussion would be facilitated in the areas set forth in this report; a report would be prepared by the conveners that would simply identify the areas of agreement and controversy, without attributing the source of the controversy. The discussion would focus on information sharing rather than on developing a consensus. If consensus was reached by those in attendance, it would be noted, but the real purpose would be the sharing of information. Meetings would be limited to four days, unless a majority of the committee believed it was appropriate to meet additionally.

SUMMARY

The recommendation of a public policy dialogue as an alternative to a regulatory negotiations was developed in June and July, 1995. During subcommittee consideration of the HUD FY 1996 apprpropriations [sic] bill in the House of Representatives, a rider was added to prohibit the Department from spending any funds to implement property insurance regulations. While this bill is in committee and depending on its final disposition, it is not prudent to go forward with any activity in this area. Accordingly, we suggest delaying any final action on the recommendations contained in this Report until such time as Congress makes its final budget determination.

Respectfully submitted,

/s/ I. B. Lobel
Ira B. Lobel
Commissioner

/s/ Linda Myers
Linda L. Myers
Commissioner

[SEAL]

U.S. Department of Housing and Urban Development
Washington, D.C. 20410-2000
December 17, 1993

[LOGO]

OFFICE OF THE ASSISTANT SECRETARY
FOR FAIR HOUSING AND EQUAL OPPORTUNITY

MEMORANDUM FOR: All Regional Directors, Office of Fair Housing and Equal Opportunity

FROM: Roberta Achtenberg, Assistant Secretary for Fair Housing and Equal opportunity, E

SUBJECT: Applicability of Disparate Impact Analysis to Fair Housing Cases

Cases which have been brought under the Fair Housing Act should now be analyzed using a disparate impact analysis, to the extent that this theory is applicable to a particular case.

Under a disparate impact analysis, a policy, standard, practice or procedure which, in operation, disproportionately adversely affects persons protected by the Fair Housing Act coverages may violate the Act.

According to a Secretarial decision in *Secretary v. Mountain Side Mobile Estates,* dated July 19, 1993, a *prima facie* case of disparate impact may be established by statistical evidence, including national statistics where there is no evidence of a large variation from local statistics, establishing that a facially neutral policy has a disparate impact on persons who are protected against discrimination. This theory only applies where there is a policy

which is, on its face, neutral, but which operates to disproportionately disadvantage persons because of race, color, national origin, religion, handicap, sex or familial status. Other theories will be applicable where the policy is unequally applied or where it is discriminatory on its face.

For purposes of investigation, this suggests that a position that a *prima facie* case has been established should be buttressed by an analysis of the evidence supporting the belief that a particular policy, practice, standard or procedure disadvantages a group or a portion of a group protected against discrimination. In some instances, this will be by analysis of waiting lists, applicant flow or occupancy data. In other cases, this will be done by an analysis of the effect of a policy on potential applicants or the population of a community in a particular income bracket.

In a second Secretarial decision in the same case, dated October 20, 1993, the Secretary confirmed that a respondent may rebut a *prima facie* case by evidence that the policy is justified by a business necessity which is sufficiently compelling to overcome the discriminatory effect. The business necessity justification may not be hypothetical or speculative.

For purposes of investigation, all of the respondent's justifications for its policy should be requested, with any supporting documentation. Each should be investigated to determine if there are genuine business reasons for the policy. The respondent should also be queried as to whether or not the respondent considered any alternatives to the particular policy, and what the reasons for

rejecting the alternatives, if any, were. Even if the respondent did not consider discriminatory alternatives, the investigation should consider whether there are any less discriminatory ways in which the respondent's business justifications may be addressed. These steps are important because if there is a less discriminatory way by which genuine business necessities may be addressed, it may be argued that the respondent should have adopted the less discriminatory alternative.

The disparate impact analysis may be applicable in a variety of situations, ranging from cases in which a local residency preference disproportionately excludes minorities from housing residency, to policies refusing to count alimony as income for purposes of housing eligibility, to occupancy cases in which a facially neutral policy disproportionately excludes or disadvantages families with children.[1]

Copies of the two Secretarial decisions are attached for your consideration.

Further examples and additional guidance will follow this memo. If you have any questions, please contact Sara Pratt, Director, Office of Investigations at (202) 708-0836.

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[1] Because the Frank Keating memorandum of March 21, 1991 addressing occupancy restrictions has not been withdrawn, occupancy cases involving a disparate impact aspect should also be analyzed using the memorandum as a guide.

STATEMENT BEFORE
THE SENATE BANKING COMMITTEE
HEARING ON INSURANCE DISCRIMINATION
Washington, D.C.
May 11, 1994
[SEAL]
By ASSISTANT SECRETARY
ROBERTA ACHTENBERG

* * *

. . . It has been 25 years since the passage of the Fair Housing Act and HUD has yet to promulgate regulations that define the lending and insurance policies and practices that violate the Act. It is high time that we do so.

Insurance Regulation

Several complex issues must be addressed in promulgating the regulation. We intend to work in close collaboration with insurance companies, trade associations, state regulators, civil rights groups, and community organizations. We have already begun informal discussions with representatives of these interests to learn more about their views and about issues they would like HUD to address through its rulemaking. These will continue in the form of group meetings, individual detailed discussions, structured focus groups and consultations on specific issues with insurance companies, advocacy groups and trade associations.

In addition, I will hold a series of public meetings around the country for industry, advocacy groups and private citizens alike to testify on the rule's content.

Based on the comments we receive, the evidence presented at the public hearings, and the written guidance we receive from additional communications with the industry and others, we will publish a proposed rule. Following careful consideration of the response we receive to that proposal, we will issue a final regulation.

We are considering what must be addressed in the regulation for it to: (1) be effective as guidance to HUD investigators, state and local civil rights agencies and private fair housing groups; (2) serve as a guidepost for preventive acts by the industry; and (3) be a clear description of the rights afforded protected classes. To do so, the regulation will address specific practices that are prohibited under the Fair Housing Act, describe the standards to be utilized in determining whether violations of the Act occur, discuss investigative techniques that will be utilized, remedies that will be sought where violations are found, and voluntary affirmative efforts that are appropriate to eliminate discrimination.

The standards to determine discrimination in this area – as in all other covered areas – will be based on the principles of overt discrimination, disparate treatment, and disparate impact.

The investigative techniques we consider will grow from our experience, but they might include statistical analysis of disclosure data, paired-testing, content analysis of underwriting manuals and other documents pertaining to evaluation of risk . . .

* * *

UNITED STATES
DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT

SAN FRANCISCO PUBLIC MEETING)
ON DISCRIMINATION IN)
PROPERTY INSURANCE)

Auditorium
California State Building
505 Van Ness Avenue
San Francisco, California

Thursday,
September 22, 1994

9:00 a.m.

APPEARANCES:

PANEL MEMBERS

ROBERTA ACHTENBERG, Assistant Secretary for Fair Housing and Equal Opportunity.

ART AGNOS, Secretary's Representative for The Western Region

LA VERA GILLESPIE, FHEO West Coast Director

MICHAEL STRUMWASSER, Special Counsel

JEAN VETA, Special Counsel

* * *

[p. 42] So, I want to ask you each the same question, if I could.

MR. BROWN: Let me just first preface the remark with whether or not there's empirical demonstration of, you know, proof that companies are in fact redlining, it seems to me these regulations are needed, period. I mean it ought not to be a burden of proof to show the practice exists before the regulations go into effect.

It ought to be the policy of the United States Government that racial discrimination or practices which have the effect of discriminating based on race ought to be unlawful under the Fair Housing Act, period.

MS. ACHTENBERG: There's no question about that, and let me also state that the department takes the position that we do have jurisdiction under the federal Fair Housing Act to define what is an unlawful practice with respect to the provision of homeowners insurance or else we wouldn't be sitting here.

So, we don't consider that to be a debatable issue. We also do not consider whether or not [p. 43] disparate impact in addition to disparate treatment are cognizable under the federal Fair Housing Act. That was purposely not asserted as a question in the advanced notice of proposed rulemaking because it is not a question. That question has been answered definitively by virtually every court of competent jurisdiction that has entertained the question.

It is also –

MR. BROWN: Good.

MS. ACHTENBERG: Insurance discrimination will be outlawed as the – as it is the policy under the Fair Housing Act to do so. So, let's – that is not the issue from our point of view.

Nonetheless, let me just say that we believe that we need to have a very significant understanding of the way the industry does its business, so that we might give guidance about how it is one sometimes must make the fine distinctions between what is discrimination, both in action and in impact, and what is not, and it's to that end that I ask for whatever empirical verification you have of the statements that you have made –

MR. BROWN: Let me –

MS. ACHTENBERG: – here today.

* * *

No. 94-9509

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MOUNTAIN SIDE MOBILE
ESTATES PARTNERSHIP, et al.,

Petitioners

v.

SECRETARY, UNITED STATES DEPARTMENT
OF HOUSING AND URBAN DEVELOPMENT,
ON BEHALF OF JACQUELINE, JAIME,
MICHAEL AND SHENA VANLOOZENOORD,
AND ON BEHALF OF MICHAEL BRACE,

Respondent

JACQUELINE VANLOOZENOORD, JAIME
VANLOOZENOORD, MICHAEL VANLOOZENOORD,
SHENA VANLOOZENOORD and MICHAEL BRACE

Intervenors

ON PETITION FOR REVIEW OF A DECISION
OF THE DEPARTMENT OF HOUSING
AND URBAN DEVELOPMENT

BRIEF FOR THE SECRETARY AS RESPONDENT

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B. The Disparate Impact Theory Applies To Fair Housing Act Claims Against Private Housing Providers

Under the disparate impact theory of liability, a facially neutral rule that disproportionately excludes members of a protected group can violate the Fair Housing Act even though the defendant was not motivated by discriminatory intent. See, *e.g.*, *Betsey v. Turtle Creek Assoc.*, 736 F.2d 983, 986-988 (4th Cir. 1984). The theory, which is also known as the discriminatory effects test, has been well-established in discrimination law since at least the early 1970s when the Supreme Court endorsed the disparate impact standard in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (interpreting Title VII of the Civil Rights Act of 1964). Mountain Side argues (Br. 17-20), however, that the disparate impact theory of discrimination does not apply to Fair Housing Act claims against private housing providers. Contrary to Mountain Side's contentions, this Court must uphold the Secretary's adoption of the disparate impact standard because it is a reasonable construction of the Act that is supported by the statutory language, the overwhelming weight of the caselaw, the legislative history and public policy interests underlying the Act.

The disparate impact standard is consistent with the statutory language. Under the Act, it is unlawful to make a dwelling unavailable to any person "because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. 3604(a). See also 42 U.S.C. 3604(b). The Supreme Court has interpreted virtually identical language in Title VII as allowing proof of discrimination under a disparate impact standard without a showing of discriminatory

intent. *Griggs*, 401 U.S. at 426-431, interpreting 42 U.S.C. 2000e-2(a)(2) (prohibiting certain actions that deny employment opportunities to an employee or job applicant "because of such individual's race, color, religion, sex, or national origin"). The Supreme Court recognized that such an interpretation was necessary to achieve Congress' broad remedial goal of providing equal employment opportunities. *Griggs*, 401 U.S. at 429-431. This logic applies with equal force under the Fair Housing Act. The Supreme Court has held that the Act must be given a "generous construction" to fulfill the statute's broad remedial purpose of achieving " 'truly integrated and balanced living patterns.' " *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 211-212 (1972), quoting 114 Cong. Rec. 3422 (1968). This ambitious remedial goal – which is at least as broad as the purposes underlying Title VII – could not be achieved if the Act were interpreted to require a showing of discriminatory intent. Sophisticated defendants may erect barriers to open housing and yet conceal their discriminatory motives, thereby making it virtually impossible for plaintiffs to establish intentional discrimination. Moreover, facially neutral practices can impede integration efforts and deny housing opportunities to minorities, families with children, and members of other protected groups even if defendants did not adopt such practices with discriminatory intent. Thus, the same reasoning that led the Supreme Court to adopt a disparate impact standard under Title VII also requires use of that test under the Fair Housing Act. Courts, including this Circuit, often use Title VII caselaw as a

model for interpreting the Fair Housing Act. See, *e.g.*, *Honce v. Vigil*, 1 F.3d 1085, 1088 (10th Cir. 1993).[5]

This Court has never decided whether the disparate impact theory applies under the Fair Housing Act.[6] Every court of appeals that has considered the issue, however, has held that a violation of the Act can be established without proof of discriminatory intent. See *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 934-935 (2d Cir.), aff'd, 488 U.S. 15 (1988); *Doe v. City of Butler*, 892 F.2d 315, 323 (3d Cir. 1989); *Edwards v. Johnston County Health Dep't*, 885 F.2d 1215, 1223 (4th Cir. 1989); *Hanson v. Veterans Admin.*, 800 F.2d 1381, 1386 (5th Cir. 1986); *Arthur v. City of Toledo*, 782 F.2d 565, 575 (6th Cir. 1986); *Metropolitan Housing Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1288-1290 (7th Cir. 1977), cert. denied, 434 U.S. 1025 (1978); *Keith v. Volpe*, 858 F.2d 467, 482-484 (9th Cir. 1988), cert. denied, 493 U.S. 813 (1989); *Jackson v. Okaloosa County*, 21 F.3d 1531, 1543 (11th Cir. 1994). See also *Casa Marie, Inc. v. Superior Court of*

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[5] See also *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209 (1972); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 935 (2d Cir.), aff'd, 488 U.S. 15 (1988); *Betsey*, 736 F.2d at 987.

[6] This Court has stated in dictum that "[i]n order to prevail on a claim made under [the Fair Housing Act], plaintiff must prove a discriminatory intent." *Asbury v. Brougham*, 866 F.2d 1276, 1279 (10th Cir. 1989). This statement does not represent a rejection of the disparate impact theory because that theory was not before the Court, which had no reason to reach the issue since it upheld the jury's finding of intentional discrimination.

Puerto Rico, 988 F.2d 252, 269 & n.20 (1st Cir. 1993) (dictum). In addition, the Supreme Court has assumed, without deciding, that the disparate impact theory of liability applies under the Act. *Town of Huntington v. Huntington Branch, NAACP*, 488 U.S. 15, 18 (1988) (upholding decision endorsing the discriminatory effects theory).

Congress was aware of these established judicial interpretations of the Fair Housing Act. By reenacting the statute without any relevant change to the statutory language, it has adopted these interpretations. *Keene Corp. v. United States*, 113 S. Ct. 2035, 2043 (1993); *Lorillard v. Pons*, 434 U.S. 575, 580-581 (1978); *Housing Auth. of Kaw Tribe of Indians of Oklahoma v. City of Ponca City*, 952 F.2d 1183, 1195 n.16 (10th Cir. 1991), cert. denied, 112 S. Ct. 1945 (1992) (interpreting Fair Housing Act). In 1988, Congress amended the Fair Housing Act to add familial status and handicap discrimination to the list of prohibited practices, to establish an administrative enforcement mechanism within HUD, and to give HUD power to issue regulations implementing the statute. At that time, Congress was fully aware that every court of appeals that had addressed the issue had endorsed use of the discriminatory effects test under the Act, see 134 Cong. Rec. 23711-23712 (1988) (statement of Senator Kennedy), and yet Congress took no action to amend the statute to overturn these judicial decisions. Indeed, Senator Kennedy, the principal Senate sponsor of the 1988 amendments, emphasized that "Congress accepted this consistent judicial interpretation" of the Act and did not intend the legislation to impose an intent requirement. *Id.* at 23712. As the principal sponsor of the legislation in the

Senate, Senator Kennedy's views provide "an authoritative guide to the statute's construction." *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 527 (1982).

The House Report accompanying the 1988 amendments also demonstrates that Congress intended that the Act incorporate a disparate impact standard. The House Judiciary Committee rejected, after debate, an amendment that would have required a showing of discriminatory intent to invalidate local zoning practices and decision under the Act. See H.R. Rep. No. 711, 100th Cong., 2d Sess. 89 (additional views of Rep. Swindall, *et al.*). Representative Swindall and five other members of the House Judiciary Committee dissented from the Committee's favorable report of the bill, in part, because it would allow plaintiffs to prove a violation under a disparate impact theory. These members warned that under the 1988 amendments, municipalities could be found liable for zoning decisions that had "a disproportionate impact on families with children." *Id.* at 90. Representative Swindall and his dissenting colleagues also viewed the Committee's rejection of the amendment as sanctioning the Second Circuit's endorsement of the discriminatory effects test in *Huntington Branch*. See *id.* at 90-91. Swindall noted that in opposing the amendment, some Committee members had argued that requiring proof of discriminatory intent would impose too heavy a burden on plaintiffs. *Id.* at 91.

In addition, the House Committee Report expressly noted that two other courts of appeals had endorsed the disparate impact theory: "Because minority households tend to be larger and exclusion of children often has a racially discriminatory effect, two federal courts of

appeal have held that adults only housing may state a claim of racial discrimination under Title VIII." H.R. Rep. No. 711 at 21, citing *Betsey v. Turtle Creek Assoc.*, 736 F.2d 983 (4th Cir. 1984), and *Halet v. Wend Inv. Co.*, 672 F.2d 1305 (9th Cir. 1982). The report also observed that housing discrimination against handicapped individuals "is not limited to blatant, intentional acts of discrimination," and emphasized that "[a]cts that have the effect of causing discrimination can be just as devastating as intentional discrimination." H.R. Rep. No. 711 at 25. This Committee report is an "authoritative source" for interpreting Congress' intent in enacting the 1988 amendments. See *Garcia v. United States*, 469 U.S. 70, 76 (1984).

Legislative history confirms that the Congress that originally enacted the Fair Housing Act in 1968 also intended it to reach practices that have discriminatory effects without proof of discriminatory purpose. Senator Mondale, the principal sponsor of the 1968 legislation, emphasized that it "seems only fair, and is constitutional, that Congress should now pass a fair housing act to undo the *effects* of these past State and Federal unconstitutionally discriminatory actions." 114 Cong. Rec. 2699 (1968) (emphasis added). In addition, the Senate rejected a proposed amendment that would have required proof of discriminatory intent in claims involving a single-family owner-occupied dwelling. 114 Cong. Rec. 5214-5222 (1968). See *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 147 (3d Cir. 1977), cert. denied, 435 U.S. 908 (1978). Opponents of the proposed amendment argued that it would make proof of discrimination too difficult. See, *e.g.*, 114 Cong. Rec. 5216 (Sen. Percy); *id.* at 5218 (Sen. Mondale).

Mountain Side nonetheless argues (Br. 19-20) that the amendment of Title VII – but not the Fair Housing Act – in 1991 indicates that Congress did not intend the disparate impact standard to apply to the Act. This is flawed reasoning. One purpose of the 1991 amendments was to overturn a portion of the Supreme Court's decision in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), which had weakened Title VII's well-established disparate impact standard developed through judicial interpretation. See Pub. L. No. 102-166, §§ 2(2), 3(2) & (3), 105 Stat. 1071 (1991); 137 Cong. Rec. S15276 (daily ed. Oct. 25, 1991). Congress did not view the 1991 amendments as creating some new theory of liability that had never existed, but rather as a restoration of the standard that had been articulated by the Supreme Court in 1971 in *Griggs*. 105 Stat. 1071. There was no comparable reason to amend the Fair Housing Act in 1991 because *Wards Cove* did not purport to interpret that statute, and because neither the Supreme Court nor the courts of appeals had rendered a comparable restrictive interpretation of the Act.

Mountain Side also argues (Br. 17-20) that even if the Fair Housing Act encompasses a disparate impact standard, it should not apply against *private* housing providers. Mountain Side suggests that it is inequitable to apply the disparate impact theory to such private defendants because doing so might hold them "responsible for consequences over which they have no control" (Br. 19), quoting *Brown v. Artery Org., Inc.*, 654 F. Supp. 1106, 1116 (D.D.C.), motion granted in part, denied in part, 691 F.

Supp. 1459 (D.D.C. 1987).[7] This reasoning is foreclosed by *Griggs*, where the Supreme Court recognized that the disparate impact of a facially neutral standard might be explained by factors over which the private defendant had no direct control, such as societal or governmental discrimination. See 401 U.S. at 430 (adverse racial impact of tests and diploma requirement could be explained, at least in part, by the inferior education that blacks received during the days of *de jure* segregation of public schools). Although the private employer in *Griggs* was obviously not responsible for such segregation, it could be required to eliminate unnecessary employment requirements whose disparate impact could be explained by such governmental discrimination. At any rate, contrary to Mountain Side's assertion (Br. 17), several other circuits have applied the discriminatory effects test in cases involving private housing providers, including two cases that were specifically cited by the House Report in

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[7] Three other cases cited by Mountain Side (Br. 17-19) provide no support for its argument. *Arlington Heights* simply recognizes that a plaintiff does not necessarily prevail merely by showing discriminatory impact. *See* 558 F.2d at 1290. If the justifications for the facially neutral rule are strong enough, they can overcome the showing of disparate impact. *Id.* at 1290-1293. This is consistent with the standard applied by the Secretary. Nor does Mountain Side derive any support from *Elliott v. City of Athens*, 960 F.2d 975 (11th Cir.), cert. denied, 113 S. Ct. 376 (1992). *Elliott* interpreted an exemption to the statute – not the standard of liability for proving a violation where, as here, no exemption applies – and specifically emphasized that it was not addressing "issues of discriminatory effect." *Id.* at 978. Finally, *Alexander v. Choate*, 469 U.S. 287 (1985), is wholly inapposite because it interpreted Section 504 of the Rehabilitation Act of 1973, not the Fair Housing Act.

1988 as examples of judicial endorsement of the disparate impact theory. See *Betsey, supra* (Private owners and managers of apartment complex), and *Halet* (action against both a private landlord and a municipality), cited in H.R. Rep. No. 711, *supra*, at 21. See also *Williams v. Matthews Co.*, 499 F.2d 819, 826-828 (8th Cir.), cert. denied, 419 U.S. 1021 (1974); *Smith v. Anchor Building Corp.*, 536 F.2d 231, 233-236 (8th Cir. 1976); *United States v. Mitchell*, 580 F.2d 789, 791 (5th Cir. 1978). Congress took no action in 1988 to override any of these decisions.

* * *

Supreme Court, U.S.
FILED
JAN 3 1996
CLERK

No. 95-714

In the Supreme Court of the United States

OCTOBER TERM, 1995

NATIONWIDE MUTUAL INSURANCE COMPANY, ET AL.,
PETITIONERS

v.

HENRY CISNEROS, SECRETARY, DEPARTMENT
OF HOUSING AND URBAN DEVELOPMENT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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DEVAL L. PATRICK
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QUESTIONS PRESENTED

1. Whether 24 C.F.R. 100.70(d), which makes it unlawful to discriminate in the terms and conditions of homeowners' insurance, is a permissible construction of the Fair Housing Act, 42 U.S.C. 3601 *et seq.*, which prohibits "mak[ing] unavailable * * * a dwelling to any person because of race, color, religion, sex, familial status, or national origin," 42 U.S.C. 3604(a), and which prohibits discrimination "in the provision of services * * * in connection" with the sale or rental of a dwelling. 42 U.S.C. 3604(b).

2. Whether the regulation applying the Fair Housing Act to insurance practices operates on its face to "invalidate, impair, or supersede" Ohio insurance regulations and therefore contravenes the McCarran-Ferguson Act, 15 U.S.C. 1012 *et seq.*

3. Whether the possibility that the Department of Housing and Urban Development will apply a disparate impact test to insurers impairs the facial validity of the regulation applying the Fair Housing Act to insurance practices.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-714

NATIONWIDE MUTUAL INSURANCE COMPANY, ET AL., PETITIONERS

v.

HENRY CISNEROS, SECRETARY, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-29) is reported at 52 F.3d 1351. The opinion of the district court (Pet. App. 85-92) is not yet reported. The report and recommendations of the magistrate judge (Pet. App. 30-84) are also not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 1, 1995. A timely petition for rehearing was denied on August 4, 1995. The petition for a writ of certiorari was filed on November 2, 1995. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves a facial challenge to a regulation promulgated by the Secretary of the Department of Housing and Urban Development. The regulation in question, 24 C.F.R. 100.70(d)(4), provides that discrimination in the provision of homeowners' insurance is a discriminatory housing practice that violates the Fair Housing Act, 42 U.S.C. 3601 *et seq.* The Secretary adopted the regulation in 1989, a year after Congress extended to him the authority to promulgate legislative rules to implement the Act. See 42 U.S.C. 3614a. The regulation codified the interpretation of the Act adhered to by the Department of Housing and Urban Development since at least 1978. Pet. App. 3. In interpreting the Act to bar discrimination in the provision of homeowners' insurance, the Secretary concluded that the discriminatory denial of homeowners' insurance "make[s housing] unavailable" in violation of 42 U.S.C. 3604(a), and that it constitutes discrimination in providing "services * * * in connection" with the sale of a house, in violation of 42 U.S.C. 3604(b).

1. The Fair Housing Act charges the Secretary of the Department of Housing and Urban Development with the responsibility for receiving, investigating and, in many cases, adjudicating charges of housing discrimination. Pet. App. 3; 42 U.S.C. 3612. The Act also empowers the Secretary to certify state and local agencies authorized to enforce state or local fair housing laws that are "substantially equivalent" to the Fair Housing Act with respect to the substantive rights protected, procedures followed, and judicial

review available. 42 U.S.C. 3610(f)(3)(A). The Dayton Human Relations Council has been certified as an agency that protects "substantially equivalent" rights under the fair housing provisions of local ordinances, and it assists the Secretary "in the local administration of housing discrimination complaints under the Fair Housing Act." Pet. App. 3.

In May of 1990, Steven and Jennifer Beavers filed a complaint with the Secretary; they alleged "that Nationwide had cancelled their homeowner's insurance because of their race and/or place of residence." Pet. App. 4. The Secretary referred the complaint to the Council, "which determined that it was 'probable' that Nationwide had violated the City of Dayton's fair housing ordinances." *Ibid.* On September 28, 1990, another individual filed a complaint with the Secretary; she alleged "that Nationwide had refused, because of her sex, race and the racial make-up of the area, to reinstate her insurance policy on a residential building that was located in a predominantly black area of Toledo, Ohio." Pet. App. 4-5. Those two complaints were under investigation by the Council and the Secretary, respectively, when petitioners brought this suit. Pet. App. 5. "Both investigations have been held in abeyance pending the conclusion of this case." *Ibid.*

2. Petitioners initiated this action on May 6, 1991, in the United States District Court for the District of Columbia. Pet. App. 5. The complaint named as defendants Jack Kemp, then the Secretary of the United States Department of Housing and Urban Development, Jerald L. Steed, Executive Director of the Dayton Human Relations Council, and the Reverend Charles Brown, Chair of the Council. *Ibid.* Petitioners later added the City of Dayton as a

defendant. *Ibid.* Petitioners sought a declaratory judgment that the defendants lack authority, under the federal Fair Housing Act or local Dayton ordinances, to regulate the provision or cancellation of property and hazard insurance. Pet. App. 32. Petitioners also sought injunctive relief to prevent the defendants from investigating or hearing complaints regarding insurance underwriting practices. *Ibid.* Petitioners claimed, *inter alia*, that the Secretary's regulation prohibiting insurance discrimination was inconsistent with the Fair Housing Act, which does not specifically refer to discrimination in the provision of insurance. *Ibid.* Petitioners also claimed that the regulation contravened the McCarran-Ferguson Act, 15 U.S.C. 1001 *et seq.*, which prohibits the construction of a general federal statute so as to "invalidate, impair, or supersede" any state law regulating the business of insurance. Pet. App. 32. The case was transferred to the United States District Court for the Southern District of Ohio after certain defendants moved for a change of venue pursuant to 28 U.S.C. 1404(a). Pet. App. 5.

Both the Secretary and the Dayton defendants moved to dismiss the complaint on jurisdictional grounds. Pet. App. 35-46. In his motion, the Secretary argued that the issues presented by the case were not ripe for judicial review. Pet. App. 35-44. The parties also filed cross motions for summary judgment on the merits. Pet. App. 46-76. The district court referred the matter to a magistrate judge. The magistrate judge concluded that the validity of the Secretary's regulation is a purely legal issue ripe for judicial review and recommended denying the Secretary's motion to dismiss. Pet. App. 36-44. On the merits of petitioners' challenge, the magistrate

judge concluded that the Secretary's regulation was entitled to deference as a permissible construction of the Fair Housing Act (Pet. App. 49-58); that the Secretary's construction was, in any event, correct (Pet. App. 58-67); and that application of the Fair Housing Act to insurance practices did not contravene the McCarran-Ferguson Act (Pet. App. 67-73). Accordingly, the magistrate judge recommended granting the Secretary's motion for summary judgment. Pet. App. 76. After considering objections filed by petitioners, the district court adopted the magistrate judge's recommendations and ordered judgment for the defendants. Pet. App. 85-92.

3. Petitioners appealed, and the Sixth Circuit affirmed. Pet. App. 1-29. The court concluded that the Secretary's regulation was entitled to deference as a permissible construction of the Fair Housing Act. Pet. App. 6-19. Applying the test set forth in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the court first inquired whether Congress had directly spoken to the question whether discrimination in homeowners' insurance violated the Fair Housing Act. Pet. App. 8-9. Following the Seventh Circuit's decision in *NAACP* v. *American Family Mut. Ins. Co.*, 978 F.2d 287 (7th Cir. 1992), cert. denied, 113 S. Ct. 2335 (1993), the court concluded that the broad statutory text was ambiguous and that petitioners "failed to show any evidence of Congressional intent to preclude the application of the Fair Housing Act to insurance underwriting practices." Pet. App. 15. The court then concluded that the Secretary's interpretation of the Act was a reasonable one "in light of the direct connection [between the] availability of property

insurance and ability to purchase a house." Pet. App. 16-18.

The court of appeals also concluded that the Secretary's regulation did not, on its face, contravene the McCarran-Ferguson Act. Pet. App. 19-27. Because the McCarran-Ferguson Act prevents the construction of general federal statutes to impair state laws that regulate the business of insurance, 15 U.S.C. 1012(b), the court considered whether application of the Fair Housing Act to discrimination in homeowners' insurance would impair any specific Ohio insurance law. The court concluded that, as applied to intentional discrimination, the Secretary's regulation clearly did not conflict with any state law. Pet. App. 26-27. Ohio insurance law prohibits "unfair discrimination," and petitioners conceded that no state law permitted or required insurers intentionally to discriminate on the basis of race. Pet. App. 20-21.

With respect to petitioners' principal ground for challenging the regulation under the McCarran-Ferguson Act—that the Secretary might apply a disparate impact analysis to insurance discrimination claims and that such an analysis might conflict with state law—the court found the claim not to be ripe for judicial review. It reasoned that the legal standards that would be applied under a disparate impact test were unclear, and that the determination whether a disparate impact test would conflict with state law would be best addressed in the context of a specific factual setting. Pet. App. 24-26.

Judge Kennedy dissented. Pet. App. 29. She concluded that "Congress did not intend for the Fair Housing Act to reach the activities of the insurance industry." *Ibid.* Because she believed that congres-

sional intent could be ascertained through "traditional tools of statutory construction," Judge Kennedy found it unnecessary to defer to the Secretary's construction. *Ibid.*

4. Petitioners filed a timely petition for rehearing with a suggestion for rehearing en banc. Pet. App. 94-95. The panel denied the petition for rehearing, with Judge Kennedy again dissenting. *Ibid.* No judge requested a vote on the suggestion for rehearing en banc. Pet. App. 94.

ARGUMENT

Petitioners present a facial challenge to the Department of Housing and Urban Development's regulation providing that discrimination in the provision of property or hazard insurance is a discriminatory housing practice in violation of the Fair Housing Act. That regulation was adopted pursuant to express congressional delegation. It permissibly implements two of the Act's broad prohibitions: (1) the prohibition on "mak[ing] unavailable * * * a dwelling to any person because of race, color, religion, sex, familial status, or national origin," 42 U.S.C. 3604(a); and (2) the prohibition on discrimination "in the provision of services * * * in connection" with the sale or rental of a dwelling, 42 U.S.C. 3604(b). Both circuits to have addressed the validity of the Department's regulation have upheld it as a reasonable construction of the Act, and every circuit to have considered the question has concluded that application of the Fair Housing Act to discrimination in the provision of insurance does not violate the McCarran-Ferguson Act.

1. The Fair Housing Act establishes a series of prohibitions on discriminatory housing practices.

Among those prohibitions, the Act makes it unlawful (42 U.S.C. 3604 (emphasis added)):

> (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, *or otherwise make unavailable or deny*, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.
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> (b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, *or in the provision of services or facilities in connection therewith*, because of race, color, religion, sex, familial status, or national origin.

When it amended the Act in 1988, Congress explicitly authorized the Secretary of the Department of Housing and Urban Development to issue legislative rules to implement the Act. 42 U.S.C. 3614a. Pursuant to that authority, the Secretary promulgated final regulations in 1989. 54 Fed. Reg. 3232 (Jan. 23, 1989). The regulations interpret the Act to prohibit discrimination in the provision of insurance; they define "other prohibited sale and rental conduct" to include (24 C.F.R. 100.70(d)(4)):

> Refusing to provide municipal services or property or hazard insurance for dwellings or providing such services or insurance differently because of race, color, religion, sex, handicap, familial status, or national origin.

This case involves a facial challenge to that regulation.

This Court's decision in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S.

837 (1984), provides the standard for reviewing an agency's legislative rules interpreting a statute it administers. As the Court recently summarized *Chevron*'s "now familiar" test (*Nationsbank of North Carolina, N.A.* v. *Variable Annuity Life Ins. Co.*, 115 S. Ct. 810, 813 (1995)):

> [W]e inquire first whether 'the intent of Congress is clear' as to 'the precise question at issue.' If so, 'that is the end of the matter.' But 'if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.'

(quoting *Chevron*, 467 U.S. at 842-843). The court of appeals properly applied that test and correctly concluded that the Secretary's regulation prohibiting insurance discrimination is valid.

a. The court of appeals found no "evidence of Congressional intent to preclude the application of the Fair Housing Act to insurance underwriting practices." Pet. App. 15. That conclusion was correct. The starting point for determining congressional intent is the statutory text. In the case of the Fair Housing Act, that text is written in broad terms: it is unlawful to "make unavailable" a dwelling because of race or to discriminate on the basis of race in providing "services" in connection with the sale or rental of a dwelling. Nothing in that text provides a basis for concluding that Congress intended to exclude insurance practices from its coverage. Instead, "[b]y writing its statute in the passive voice—banning an outcome while not saying who the actor is, or how such actors bring about the forbidden consequence—Congress created ambiguity." *NAACP* v.

American Family Mut. Ins. Co., 978 F.2d 287, 298 (7th Cir. 1992), cert. denied, 113 S. Ct. 2335 (1993).

The petition for certiorari does not present any argument that the statute unambiguously excludes the provision of insurance from its coverage. In the court of appeals, petitioners claimed that traditional canons of construction established that the Fair Housing Act does not prohibit insurance discrimination. See *Chevron*, 467 U.S. at 843 n. 9 ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."). The court of appeals correctly concluded that the canons of construction identified by petitioners did not demonstrate a clear congressional intent to exclude insurance from the Act's coverage.

Below, petitioners pointed to two principles of statutory construction. They first contended that the *ejusdem generis* principle required the general term "otherwise make unavailable or deny" to be limited to objects that directly affect the availability of a dwelling like the specific terms preceding it: "refuse to sell or rent" and "refuse to negotiate for the sale or rental." The court of appeals recognized, however, that petitioners' argument merely begs the question whether denial of property insurance does in fact operate directly to render housing unavailable (Pet. App. 10-11)—precisely the type of "judgment[] about the way the real world works * * * that agencies are better equipped to make than courts."

Pension Benefit Guaranty Corp. v. *LTV Corp.*, 496 U.S. 633, 651 (1990).[1]

Second, petitioners contended that the *expressio unius* maxim foreclosed application of the Act to discriminatory insurance practices. Petitioners noted that one provision of the Act (42 U.S.C. 3605) specifically prohibits discrimination in mortgage lending. They argued that such a specific prohibition would be superfluous if the "otherwise make unavailable" language of 42 U.S.C. 3604(a) could also be applied to practices like mortgage discrimination that effectively deny the availability of housing. But application of the *expressio unius* maxim does not demonstrate a clear legislative intent to limit the scope of Section 3604, particularly in light of the broad language of that provision. This Court has long

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[1] The lower courts have interpreted the term "otherwise make unavailable or deny" in Section 3604(a) to cover a variety of discriminatory practices that are not expressly mentioned in the statute, and that have a clear, although indirect, effect on the availability of housing. See, *e.g.*, *Heights Community Congress* v. *Hilltop Realty, Inc.*, 774 F.2d 135, 140 (6th Cir. 1985) (real estate steering), cert. denied, 475 U.S. 1019 (1986); *United States* v. *City of Parma*, 661 F.2d 562, 574-576 (6th Cir. 1981) (City's failure to adopt resolution of goodwill, rejection of low-income housing, and adoption of land use ordinances with discriminatory impact), cert. denied, 456 U.S. 926 (1982); *Metropolitan Housing Dev. Corp.* v. *Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977) (municipal refusal to rezone land to permit construction of low-income housing), cert. denied, 434 U.S. 1025 (1978); *Kennedy Park Homes Ass'n, Inc.* v. *City of Lackawanna, N.Y.*, 436 F.2d 108 (2d Cir. 1970) (refusal to permit sewer hookup), cert. denied, 401 U.S. 1010 (1971); *United States* v. *American Inst. of Real Estate Appraisers*, 442 F. Supp. 1072, 1079 (N.D. Ill. 1977) (discrimination by real estate appraisers), appeal dismissed, 590 F.2d 242 (7th Cir. 1978).

noted the generous scope of the Fair Housing Act's provisions. See *City of Edmonds* v. *Oxford House, Inc.*, 115 S. Ct. 1776, 1780 & 1783 n.11 (1995); *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205, 209 (1972). Against that backdrop, the court of appeals correctly concluded "that §§ 3604 and 3605 overlap and are not mutually exclusive." Pet. App. 12. As the Seventh Circuit has noted, "[c]onveying meaning to diverse interpreters for an uncertain future is a difficult business. A wise drafter may state a principle in one section and list some applications of that principle in another, to make pellucid what ought to be apparent but which some judges (and many lay persons) will miss unless spelled out." *American Family Mut. Ins. Co.*, 978 F.2d at 298.

b. Because the Fair Housing Act is "silent or ambiguous" regarding its application to insurance, the Secretary's regulation outlawing discriminatory insurance practices must be upheld if it is "based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843; see also *Trafficante*, 409 U.S. at 210 (concluding, even before Congress's grant of legislative rulemaking authority, that the Secretary's construction of the Fair Housing Act was "entitled to great weight"). To be permissible, the Secretary's construction need not be "the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Chevron*, 467 U.S. at 843 n.11.[2]

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[2] Although there is some tension between the decision below and the Fourth Circuit's decision in *Mackey* v. *Nationwide Ins. Cos.*, 724 F.2d 419 (4th Cir. 1984), the two cases do not conflict. *Mackey* was decided four years before the Secretary had authority to issue legislative rules implementing the Act, and five years before the Secretary promulgated a regulation defining insurance discrimination as a discriminatory housing

The court of appeals correctly concluded that the Secretary's construction is permissible. Obtaining homeowners' insurance is an integral part of the process of buying a house. Property insurance therefore falls within a natural reading of the term "services * * * in connection" with the purchase or sale of a dwelling. *American Family Mut. Ins. Co.*, 978 F.2d at 298.[3] In addition, there is no question that discriminatory denial of property insurance "make[s] housing unavailable." The Secretary has long recognized that lenders ordinarily require their borrowers to secure property insurance. See *Dunn* v. *Midwestern Indemnity Mid-American Fire & Casualty Co.*, 472 F. Supp. 1106, 1109 n.7 (S.D. Ohio 1979) (citing Memorandum of the General Counsel of Housing and Urban Development to Chester McGuire, Ass't Sec'y for Equal Opportunity (Aug. 15, 1978)). An individual who cannot obtain insurance will be unable to obtain a mortgage and, for that reason, unable to obtain a house. *Dunn*, 472 F. Supp. at 1109. In promulgating regulations to implement the Act, the Secretary

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practice. *Mackey* thus involved the court's own interpretation of the statute, not the permissibility of the Secretary's interpretation. "No matter how a court should have understood the Fair Housing Act in 1984, * * * the question today is whether the Secretary's regulations are tenable." *American Family Mut. Ins. Co.*, 978 F.2d at 301.

[3] Petitioners point (Pet. 14 n.20) to the Fourth Circuit's statement that "services" in the statute "encompasses such things as garbage collection and other services of the kind usually provided by municipalities." *Mackey*, 724 F.2d at 424. As the Seventh Circuit concluded, however, there is simply no basis for that restricted reading of the term "services." *American Family Mut. Ins. Co.*, 978 F.2d at 299 ("[I]t is hard to understand § 3604 as restricted to garbage collection and like services.").

therefore concluded that "discrimination in the provision of those services and facilities which are prerequisites to obtaining dwellings, including refusals to provide municipal services or adequate property or hazard insurance, * * * render housing unavailable in violation of the Fair Housing Act." 54 Fed. Reg. 3232, 3240 (1989) (preamble to final rule).

In the court of appeals petitioners made two arguments in addition to their statutory construction argument, see *supra* pp. 10-12, for limiting the scope of the broad language in Section 3604. First, they relied on the absence of any reference to insurance in the Act's legislative history. As this Court has held, however, broad statutory language cannot be limited to the examples of its application set forth in the legislative history. *Pension Benefit Guaranty Corp.*, 496 U.S. at 649. Petitioners suggested below that a different rule should apply here because in the same year Congress enacted the Fair Housing Act it also enacted the Urban Property Protection and Reinsurance Act of 1968, Pub. L. No. 90-448, Tit. XI, 82 Stat. 555 (codified as amended at 12 U.S.C. 1749bbb *et seq.*) (UPPRA). UPPRA established a scheme of riot reinsurance designed to assure that property insurance would be available in depressed urban areas. Because of the different purposes of the two statutes, the court of appeals correctly concluded that "the enactment of UPPRA does not shed light on Congress' intent regarding the application of the Fair Housing Act to insurance underwriting practices." Pet. App. 14. There is no reason to believe that Congress's decision to provide an economic incentive for insurers to serve economically depressed areas entailed a decision to foreswear any federal statutory protection against racial discrimination in the pro-

vision of homeowners' insurance. The passage of UPPRA provides no basis for artificially limiting the broad language of the Fair Housing Act.

Second, petitioners argued below that the Act's subsequent legislative history demonstrated that Congress intended not to cover insurance. Petitioners pointed to the fact that, several years after the statute's enactment, Congress defeated proposals to make explicit that the Act covered discriminatory insurance practices. The court of appeals correctly rejected that argument. Pet. App. 14-15; accord *American Family Mut. Ins. Co.*, 978 F.2d at 299-300. This Court has long held that "subsequent legislative history is a 'hazardous basis for inferring the intent of an earlier' Congress. It is a particularly dangerous ground on which to rest an interpretation of a prior statute when it concerns, as it does here, a proposal that does not become law." *Pension Benefit Guar. Corp.*, 496 U.S. at 650 (quoting *United States* v. *Price*, 361 U.S. 304, 313 (1960)).

c. Petitioners contend that it was improper for the court of appeals even to apply the *Chevron* deference analysis here. Although petitioners do not make a sustained argument on this point, their discussion suggests two reasons for reaching that conclusion. Neither is persuasive.

First, petitioners suggest that the issue here is a "pure question of statutory construction," and that administrative constructions are entitled to no deference on those questions. Pet. 15. That is incorrect. It is undisputed that if a court can ascertain Congress's intent on the precise question at issue—either in the plain language of the statute or through the traditional tools of statutory construction—then "that intention is the law and must be given effect."

Chevron, 467 U.S. at 843 n.9. Absent an unambiguous expression of congressional intent, however, an agency's interpretation of a statute that it is empowered to administer is entitled to deference. Petitioners do not point to a single case to the contrary. In *INS* v. *Cardoza-Fonseca*, 480 U.S. 421 (1987), this Court declined to accord deference to a construction arrived at in an agency adjudication, because that interpretation was inconsistent with the statute's "plain language" (*id.* at 432) and therefore "contrary to clear congressional intent." *Id.* at 447-448 (quoting *Chevron*, 467 U.S. at 843 n.9). And in *NLRB* v. *United Food & Commercial Workers Union*, 484 U.S. 112 (1987), this Court reaffirmed *Chevron*'s holding that its "first job" in answering "a pure question of statutory construction" is to attempt to discern Congress's intent and that, "where the statute is silent or ambiguous with respect to the specific issue," deference is required. *Id.* at 123 (internal quotation marks omitted). The Court then upheld the administrative construction on the basis of that *Chevron* analysis. See *id.* at 133-134 (Scalia, J., concurring). Because the Fair Housing Act is "silent or ambiguous" regarding coverage of insurance practices, the Secretary's regulation is entitled to deference under that holding.

Second, petitioners suggest that deference is not appropriate here because the question involves one of agency jurisdiction. Pet. 15-16. But rather than establishing a jurisdictional rule, the Secretary's regulation resolves a question of the Act's substantive coverage: whether homeowners' insurance is a "service[] * * * in connection" with the sale of a dwelling, and whether denial of homeowners' insurance "make[s a dwelling] unavailable." In concluding

that the discriminatory denial of homeowners' insurance comes within that language, the Secretary has made "a reasonable choice within a gap left open by Congress." *Chevron*, 467 U.S. at 866; cf. *NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111, 130 (1944) (determining "who is an employee" covered by the National Labor Relations Act is a "task * * * assigned primarily to" the Board); *NLRB* v. *Town & Country Elec., Inc.*, 116 S. Ct. 450, 453 (1995) (same).

2. Petitioners contend that the Secretary's regulation applying the Fair Housing Act to insurance discrimination contravenes the McCarran-Ferguson Act, 15 U.S.C. 1011 *et seq.* The court of appeals correctly rejected that contention. Pet. App. 27. Indeed, every circuit to have addressed the issue has concluded that application of the Fair Housing Act to discrimination in homeowners' insurance does not violate the McCarran-Ferguson Act. See *American Family Mutual Ins. Co.*, 978 F.2d at 295-297; *Mackey*, 724 F.2d at 421.

a. In enacting the McCarran-Ferguson Act, Congress's "primary concern" was to "ensure that the States would continue to have the ability to tax and regulate the business of insurance." *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U.S. 205, 217-218 (1979). To that end, Congress protected state laws regulating insurance from inadvertent preemption by federal statutes: "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance * * * unless such Act specifically relates to the business of insurance." 15 U.S.C. 1012(b).

As the statutory language makes clear, the McCarran-Ferguson Act does not dictate "unqualified deferral to state law." *John Hancock Mut. Life Ins. Co.* v. *Harris Trust & Savings Bank*, 114 S. Ct. 517, 525 (1993). The mere fact that a state regulates insurance does not prevent the application of a general federal statute to insurance practices; rather, the McCarran-Ferguson Act applies only where the federal statute's application would "invalidate, impair, or supersede" some specific state law regulating insurance. This Court has at least implicitly recognized that the statutory text requires a showing of a specific conflict between some particular state law and the federal statute at issue. See *United States Dep't of Treasury* v. *Fabe*, 113 S. Ct. 2202, 2211 (1993) (McCarran-Ferguson Act imposes "a rule that state laws enacted 'for the purpose of regulating the business of insurance' do not yield to conflicting federal statutes unless a federal statute specifically requires otherwise"). The lower courts have made that recognition explicit. See, *e.g.*, *Merchants Home Delivery Serv., Inc.* v. *Frank B. Hall & Co., Inc.*, 50 F.3d 1486, 1489 (9th Cir. 1995); *American Family Mut. Ins. Co.*, 978 F.2d at 295-297; *Mackey*, 724 F.2d at 421; *Cochran* v. *Paco, Inc.*, 606 F.2d 460, 464 (5th Cir. 1979). In light of those principles, the mere fact that Ohio regulates insurance does not preclude application of the Fair Housing Act to discriminatory insurance practices in that state. "The presence of a general regulatory scheme does not show that any particular state law would be invalidated, impaired or superseded by the application of the Fair Housing Act." *Mackey*, 724 F.2d at 421.

b. In asserting that the Secretary's regulation conflicts with state law, petitioners and the court of

appeals have distinguished two different types of Fair Housing Act claims: disparate treatment claims and disparate impact claims. With regard to disparate treatment claims—that is, claims of intentional discrimination—petitioners have not demonstrated how enforcement of the Secretary's regulation would create a conflict with a state statute. Nor could they, for no Ohio statute authorizes or requires insurers intentionally to discriminate on the basis of race. Indeed, the Ohio Insurance Code expressly forbids "unfair discrimination between individuals of the same class and of essentially the same hazard." Ohio Rev. Code Ann. § 3901.21(M) (Anderson Supp. 1994). And the Ohio Civil Rights Act prohibits discrimination in the terms and conditions of "fire, extended coverage, or homeowners insurance, because of race, color, religion, sex, familial status, ancestry, handicap, or national origin or because of the racial composition of the neighborhood in which the housing accommodations are located." Ohio Rev. Code Ann. § 4112.02(H)(4) (Anderson 1995). The Ohio Civil Rights Act, like the Fair Housing Act, provides private civil remedies, jury trials, and compensatory and punitive damages. *Id.* § 4112.051. Such "[d]uplication is not conflict." *American Family Mut. Ins. Co.*, 978 F.2d at 295.

In the court of appeals, petitioners' challenge focused on the application of the Secretary's regulation to disparate impact claims. Petitioners asserted that requiring insurers to avoid practices that are discriminatory in effect would be inconsistent with the state law prohibiting "unfair discrimination" among risks. Even if petitioners' assertion were correct, the facial challenge to the Secretary's regulation would still fail. A party challenging the facial

validity of a regulation faces the "heavy burden" of establishing that no set of facts exists under which the regulation would be valid. *Rust* v. *Sullivan*, 500 U.S. 173, 183 (1991). Because the Secretary's regulation is clearly valid at least as applied to disparate treatment claims, the suggestion that it might be improper to apply the Fair Housing Act to disparate impact claims (or to some subcategory thereof) does not serve as a basis for invalidating the regulation on its face.

c. In any event, petitioners have not demonstrated that applying disparate impact analysis to insurance discrimination would facially conflict with Ohio law and thus be inconsistent with the McCarran-Ferguson Act. First, Ohio's broad civil rights statute may already incorporate a prohibition on insurance practices that are discriminatory in effect. As noted, the Ohio Civil Rights Act explicitly applies to insurance practices, and it provides remedies similar to those available under the Fair Housing Act. The language of the Ohio statute "tracks the language" of the Fair Housing Act, *Aloqaili* v. *National Housing Corp.*, 743 F. Supp. 1264, 1272 (N.D. Ohio 1990), and at least one state court has held that the state law "appears to contain language more favorable for maintaining a housing discrimination suit than the federal Fair Housing Act." *Toledo Fair Housing Center* v. *Nationwide Mut. Ins. Co.*, No. 93-1685 (Ohio Ct. Common Pleas of Lucas County, Dec. 28, 1993), slip op. 3-4. Thus, to the extent that the Secretary's regulation prohibits insurance practices that are discriminatory in effect, it is likely that Ohio law already incorporates a similar prohibition.

Second, petitioners have not shown how disparate impact enforcement of the Secretary's regulation will

conflict with the state-law prohibition on unfair discrimination among risks. Petitioners appear to contend that application of an effects test to insurance practices will require them to make underwriting decisions that are prohibited by state law or vice versa. But petitioners have not identified *any* specific underwriting practices that they believe an effects test will prevent them from employing, nor have they explained why those practices would be required by state law. Any court considering a claim that an insurance practice violates the Fair Housing Act because of disparate impact would necessarily engage in a highly fact-specific analysis of the effects and of the claimed business justifications of the particular practice at issue. The court would examine precisely what effect the practice has on groups protected by the Act, as well as any business justification asserted in defense of the practice. See, *e.g.*, *Huntington Branch, NAACP* v. *Town of Huntington*, 844 F.2d 926, 934-937 (2d Cir.), aff'd, 488 U.S. 15 (1988). (That a practice was required by state law would of course be relevant in that inquiry.) Petitioners, however, have provided none of that information. They merely assert that compliance with the Fair Housing Act's prohibition on practices with a disparate impact will place them at risk of violating state "unfair discrimination" laws. Pet. 19. But the fact that application of an effects test to insurance discrimination might contravene the McCarran-Ferguson Act "under some conceivable set of circumstances is insufficient to render [the regulation] wholly invalid." *Rust*, 500 U.S. at 183 (internal quotation marks omitted). The court of appeals therefore

properly concluded that petitioners' challenge did not render the regulation invalid on its face.[4]

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[4] In concluding that petitioners' challenge did not render the regulation facially invalid, the court of appeals relied on the ripeness doctrine. Pet. App. 21-26. That reliance was slightly misleading. By resolving petitioners' facial challenge to the Secretary's regulation on the merits, the court of appeals implicitly recognized that petitioners' basic claim (challenging the application of the Fair Housing Act to insurance discrimination at all) presented a "purely legal" issue ripe for judicial review. *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 149 (1967). However, the court of appeals concluded that petitioners' subsidiary challenge to disparate impact enforcement of the Fair Housing Act was not yet fit for judicial resolution. Pet. App. 25-26. That conclusion was correct. Because petitioners have not identified any particular underwriting practice that they believe a disparate impact approach will prevent them from employing, petitioners' challenge presents merely an "abstract disagreement[] over administrative polic[y]." *Abbott Laboratories*, 387 U.S. at 148. Moreover, because any application of disparate impact analysis to a particular underwriting practice would involve a highly fact-specific inquiry into the effects of and business justifications for that practice, this is a case where "consideration of the underlying legal issues would necessarily be facilitated if they were raised in the context of a specific attempt to enforce the regulations." *Gardner* v. *Toilet Goods Ass'n*, 387 U.S. 167, 171 (1967). Those factors demonstrate that petitioners' anticipatory challenge to disparate impact enforcement of the Secretary's regulation is not yet ripe; they also demonstrate that the challenge does not impair the facial validity of the regulation. But whether the question is considered under the rubric of ripeness or of the appropriate limits on a facial challenge, the court of appeals was correct in rejecting petitioners' claim.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1996

MOTION FILED

JAN 3 1996

No. 95-714

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

NATIONWIDE MUTUAL INSURANCE CO. and
NATIONWIDE MUTUAL FIRE INSURANCE CO.,
Petitioners,

v.

HENRY CISNEROS, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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22 pp

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

No. 95-714

NATIONWIDE MUTUAL INSURANCE CO. and
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v.

HENRY CISNEROS, *et al.*,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.3 of the Rules of this Court, the Washington Legal Foundation and the Allied Educational Foundation respectfully move for leave to file the attached brief as *amici curiae* in support of Petitioners. Counsel for Petitioners has consented to the filing of this brief, as has counsel for Respondent Cisneros. Counsel for Respondents Steed, Brown, and the City of Dayton (the "Dayton Respondents") has declined to consent to the filing (albeit counsel provided a letter stating that the Dayton Respondents "do not object" to the filing), thereby necessitating the filing of this motion.

The Washington Legal Foundation ("WLF") is a non-profit public interest law and policy center with more than 100,000 supporters nationwide. WLF devotes a substantial amount of its time to the promotion and preservation of free markets and market-oriented solutions to economic

problems. It believes that, in the great run of cases, the unfettered competitive market will produce the greatest good for the greatest number, including, in particular, consumers. To that end, WLF has appeared in this Court and other courts around the country in cases raising issues that affect the operation of markets and the opportunity for ordinary citizens to enjoy their benefits. *See e.g., Rubin v. Coors Brewing Co.*, 115 S. Ct. 1505 (1995); *Hartford Fire Ins. Co. v. California*, 113 S. Ct. 2891 (1993); *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742 (1993).

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study such as history, law, and public policy, and has appeared as *amicus curiae* before this Court on a number of occasions.

WLF and AEF seek to file the attached brief because of their interest in the operation of an efficient and competitive marketplace in which goods and services are allocated in a nondiscriminatory manner. They have no direct interest, financial or otherwise, in the outcome of this case and believe that they can assist the Court by providing a perspective that is distinct from that of any party.

For the foregoing reasons, WLF and AEF respectfully request that they be allowed to participate in this case by filing the attached brief.

Respectfully submitted,

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Dated: January 3, 1996

QUESTION PRESENTED

Amici, the Washington Legal Foundation and the Allied Educational Foundation, address the following questions only:

1. Whether the Fair Housing Act ("the Act"), 42 U.S.C. § 3601, *et seq.*, regulates the provision of property insurance.

2. Whether the interpretive regulations of the United States Department of Housing and Urban Development ("HUD"), which construe the Act to cover the business of insurance, are entitled to substantial deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

No. 95-714

NATIONWIDE MUTUAL INSURANCE CO. and
NATIONWIDE MUTUAL FIRE INSURANCE CO.,
Petitioners,

v.

HENRY CISNEROS, *et al.*,
Respondents.

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTERESTS OF AMICI CURIAE

The Washington Legal Foundation ("WLF") is a non-profit public interest law and policy center with more than 100,000 supporters nationwide. WLF devotes a substantial amount of its time to the promotion and preservation of free markets and market-oriented solutions to economic problems. It believes that, in the great run of cases, the unfettered competitive market will produce the greatest good for the greatest number, including, in particular, consumers. To that end, WLF has appeared in this Court and other courts around the country in cases raising issues that affect the operation of markets and the opportunity for ordinary citizens to enjoy their benefits. *See e.g., Rubin v. Coors Brewing Co.*, 115 S. Ct. 1505 (1995); *Hartford Fire*

Ins. Co. v. California, 113 S. Ct. 2891 (1993); *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742 (1993).

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study such as history, law, and public policy, and has appeared as *amicus curiae* before this Court on a number of occasions.

Racial and other invidious discrimination has no place in a competitive marketplace. In a properly functioning market, irrational discrimination will tend to be driven out by more efficient, economically rational competitors. WLF and AEF believe that the operation of a competitive market can, and should, be strengthened by laws forbidding invidious and intentional discrimination. But WLF and AEF are concerned that increasingly intrusive federal regulation targeted at activity that, while free of discriminatory intent, is thought to have a "disparate impact," distorts rather than facilitates the operation of markets. Such regulation results not in the allocation of goods and services in a nondiscriminatory manner, but in a group-based "spoils" system.

This may be particularly so in the business of property insurance, where companies must draw distinctions between classes of insureds based on the risks each presents. This drawing of distinctions, undertaken in the development of underwriting criteria and the writing of policies, is designed to ensure that similarly situated people are treated similarly and that one class of risks does not unfairly subsidize another. If insurers are forced to abandon this long-standing objective of underwriting and actuarial practice in order to ensure equal treatment for the multiplicity

of groups protected under the Fair Housing Act regardless of risk, the market for insurance products will be distorted and insurance consumers will suffer.

STATEMENT OF FACTS

In the interest of judicial economy, WLF and AEF hereby adopt the Statement of the Case contained in the petition. In brief, the petition arises from a case seeking a declaration, and supporting injunction, that the Fair Housing Act, 42 U.S.C. § 3601, *et seq.* ("the Act"), does not apply to the business of property insurance and that the Department of Housing and Urban Development ("HUD") has no authority to regulate insurance. Petitioners, two related national property insurers, brought this action in federal district court. A Magistrate Judge for the U.S. District Court for the Southern District of Ohio recommended, and the District Judge agreed, that the Petitioners' claim was ripe for review, but that their motion for summary judgment should be denied. The District Court held that the Act did apply to the business of property insurance and that HUD does have the authority to issue regulations affecting it. Appendix to Petition for Writ of Certiorari (hereinafter "Pet. App.") 85-92.

On appeal, a divided court of appeals affirmed. *Nationwide Mutual Insurance Co. v. Cisneros*, 52 F.3d 1351 (6th Cir. 1995); Pet. App. 1-29. The majority -- reaching the same conclusion as the Seventh Circuit in *NAACP v. American Family Mutual Insurance Co.*, 978 F.2d 287 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 2335 (1993), and rejecting that of the Fourth Circuit in *Mackey v. Nationwide Insurance Companies*, 724 F.2d 419, 423 (4th Cir. 1984) -- concluded, *inter alia*, that HUD's

interpretation that the Act did apply to the business of insurance was "reasonable" and entitled to substantial deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837 (1984). Pet. App. 17.

The majority concluded that § 3604(a) of the Act, which makes it unlawful "to refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling" because of race, color, religion, sex, familial status, or national origin, should be read to apply to the provision of property insurance; and that this construction of the Act, adopted by HUD, did not render other statutory language superfluous. The Court of Appeals concluded that neither the legislative history of the Act nor the subsequent refusal of Congress to extend the Act to expressly encompass insurance demonstrated the absence of a congressional intent to apply the Act to the business of insurance.

The Court of Appeals rejected Petitioners' argument that the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*, preempted application of the Act to property insurance, concluding the application of the Act based upon a theory of disparate treatment (intentional discrimination) would not "invalidate, impair, or supersede any state law enacted to regulate the business of insurance" without express congressional authorization as required by the McCarran-Ferguson Act. It refused to consider Petitioners' argument that application of the Act on a disparate impact theory (basing a violation upon a disproportionate effect on a protected group even in the absence of discriminatory intent) should be preempted by the McCarran-Ferguson Act

because, in the majority's view, this question was not ripe for review.

After denial of their request for rehearing *en banc* of the panel's determination that their disparate impact McCarran-Ferguson preemption argument was not ripe for review, Pet. App. 94-95, Petitioners sought review of the Sixth Circuit's decision in this Court.

REASONS FOR GRANTING THE WRIT

I. THE APPLICATION OF THE FAIR HOUSING ACT TO THE BUSINESS OF INSURANCE MERITS REVIEW.

As the Seventh Circuit observed in *American Family*, insurance involves the categorization of risks and the distinction between groups thought to present different risks of loss:

> For example, term life insurance costs substantially more per dollar of death benefit for someone 65 years old than for one 25 years old, although the expected return per dollar of premium is the same to both groups because the older person, who pays more, also has a higher probability of dying during the term. Auto insurance is more expensive in a city than in the countryside, because congestion in cities means more collisions. Putting young and old, or city and country into the same pool would lead to adverse selection; people knowing that the risks they face are less than the average of the pool would drop out. A single price for term life insurance would dissuade younger persons from insuring, because the price would be too steep for the coverage offered; the remaining older persons

> would pay a price appropriate to their age, but younger persons would lose the benefits of insurance altogether. To curtail adverse selection, insurers seek to differentiate risk classes with many variables.

NAACP v. American Family Mut. Ins. Co., 978 F.2d at 290.

While no one believes that such insurance underwriting decisions should be based on race, the drawing of insurability distinctions related to risk is essential. While the characteristics of each individual insured are important, it is not possible to assess the actual risks posed by each individual. In addition, as the Seventh Circuit noted, the failure to appropriately distinguish among classes of risks will lead to adverse selection and drive up the cost of insurance.

Distinguishing among insureds on the basis of race is already forbidden by the laws of the individual states. Neither Ohio (in this case) nor Wisconsin (in the *American Family* case) nor any other State in the nation permits insurance companies to engage in discrimination on account of the race of an individual or the racial composition of the area in which his or her property is located. But application of the Fair Housing Act to the business of insurance threatens to impose obligations on insurers extending far beyond the mandate of race-neutral even-handedness imposed upon them by State law. While this Court has not resolved the question (*Town of Huntington v. Huntington Branch, NAACP*, 488 U.S. 15, 18 (1988)), both HUD (Pet. App. 135, 139, 141) and a number of courts have stated (in cases not involving property insurance) that the Act is violated not only by conduct undertaken with discriminatory intent, but also by acts which have a disparate impact

on different racial groups. *See e.g., Arthur v. City of Toledo*, 782 F.2d 565, 575 (6th Cir. 1986); *U.S. v. City of Parma*, 661 F.2d 562, 575-76 (6th Cir. 1981), *cert. denied*, 456 U.S. 926 (1982), *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 934 (2d Cir.), *aff'd*, 488 U.S. 15 (1988); *Halet v. Wend Investment Co.*, 672 F.2d 1305, 1311 (9th Cir. 1982); *Resident Advisory Board v. Rizzo*, 564 F.2d 126, 146-48 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978).

Moreover, the Fair Housing Act concerns itself with far more than just race and color. The Act also prohibits discrimination on the basis of religion, sex, handicap, familial status, or national origin. 42 U.S.C. § 3604. Disparate impact analysis has generally been understood to apply to Fair Housing Act claims alleging these other types of discrimination as well. *See, e.g., United States v. Badgett*, 976 F.2d 1176, 1179 (8th Cir. 1992)(familial status discrimination).

In the face of these court decisions, reasonable insurers must structure their business practices to survive disparate impact scrutiny. As this Court recognized in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), parties subject to a clear position on the part of a regulator are left with no course but to change their practices rather than "follow their present course and risk prosecution."[1] *Abbott Laboratories*, 387 U.S. at 152. While *amici* believe that the Act should not, and hope that it will not, ultimately be interpreted by this Court to impose liability under a disparate

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[1] For these reasons, WLF and AEF agree with, but will not repeat, Petitioners' argument that their "disparate impact" McCarran-Ferguson claim is ripe for review.

impact standard or to have any application to the property insurance business, an insurer cannot afford to be so sanguine. HUD has made clear its intent to enforce the Act using such a standard, and that policy is having consequences for all property insurers.

A variety of traditional insurance practices can have a disparate impact on groups protected by the Act. In our society, there is often a statistical correlation between groupings addressed by the Act (such as race or familial status) and factors which might be relevant to marketing and underwriting of insurance, such as lower household income and housing values, older dwellings, higher frequencies of loss, etc. Although membership in a protected class does not "cause" these things, they do co-exist. To the extent that factors such as these are related to underwriting criteria traditionally relied upon by insurance companies, those criteria may have a disparate impact on groups protected under the Fair Housing Act and will be subject to regulatory or judicial attack.

Many insurance companies, for example, refuse to insure a property for an amount substantially in excess of its market value. To do so, they believe, creates a moral hazard. A homeowner with a $100,000 insurance policy on a $50,000 home stands to profit if he burns his house down and submits a claim to the insurance company. Although the overwhelming majority of people would not consider such an act, most insurers are unwilling to create an incentive that will tempt an unscrupulous few and turn a profitable book of business into a losing one.

Yet, such a policy may well have a disparate impact in older neighborhoods in central cities where the replacement cost of a home is high (because it may be large and

constructed of dated materials), while its market value is low. Such neighborhoods may be disproportionately inhabited by certain types of families (e.g., families with children), by the foreign-born, or by members of certain racial groups. Regulators attacking such rules will argue that no insurance company has ever statistically established a likelihood that over-insurance leads to a higher level of loss, but an insurance company could only test this proposition by conducting an experiment by which it deliberately overinsured properties and waited to see what happens. Such a company would be conducting an experiment with real money and, perhaps, creating an incentive for real arson. Even then, sorting out the impact of over-insurance with a certainty that will satisfy everyone is a difficult task in a complex world.

Similarly, many insurers believe that significantly increasing the number of occupants of a dwelling increases the risk of property damage. But any insurance company attempting to incorporate that belief into its underwriting decisions faces a substantial risk that it will be charged with handicap or familial status discrimination, because families with children and adult residential homes for the handicapped generally entail greater-than-average number of residents per living unit.

Insurers faced with such onerous obstacles may choose not to "validate" but to abandon business practices that have served them and their policyholders well for many years. In response to this and to the specter of expensive and crippling administrative enforcement, insurers may find themselves under increasing pressure to "insure by the numbers" and thereby avoid regulatory scrutiny. Those faced with enforcement actions may decide that the more prudent course is to pay whatever is demanded as the price

of peace with HUD and modify practices that have withstood the challenge of the market. To enter into expensive and market-distorting settlements will hurt not only the insurer, but all who participate in the market, including consumers.

Such an extraordinary federal intervention into an insurance industry traditionally regulated by the States should not occur without a finding of clear congressional intent and clear direction from this court.

Moreover, as noted above, the circuits are divided on this issue. The Sixth Circuit (in this case) and Seventh Circuit (in the *American Family* case) have held that the Act covers the provision of property insurance. The Fourth Circuit (in *Mackey*) reached the opposite conclusion. In light of the importance of the issues raised, the Court should grant the writ of certiorari in order to resolve this conflict.

II. THE SIXTH CIRCUIT'S DEFERENCE TO HUD MISCONSTRUES PRIOR DECISIONS OF THIS COURT

WLF believes that the language of the Act clearly indicates that it does not apply to insurance. As noted before, § 3604(a) makes it unlawful to refuse to sell or to rent or to "otherwise make unavailable or deny" a property on the basis of a number of different characteristics, including race, religion, familial status, and national origin. This language cannot reasonably be read to include the provision of property insurance. The statutory language, under any straight-forward reading, can only be construed to include conduct expressly mentioned by the statute, i.e., refusing to sell or rent a home and certain unspecified

conduct which itself makes a particular dwelling unavailable, *e.g.*, racial steering or exclusionary zoning. HUD has argued, however, that even conduct that neither involves the provision of a dwelling nor in and of itself makes the dwelling unavailable may be wedged into the language of § 3604(a) if, in conjunction with intervening events, that conduct contributes to the unavailability of housing. This argument tears § 3604(a) from the moorings of its language, applying it to a host of activities that have little to do with making dwellings unavailable.

Discrimination in the provision of property insurance does not, by itself, make a dwelling unavailable. At most, it makes the acquisition of financing more difficult. The inability to obtain financing, in turn, may make it more difficult to purchase a dwelling. But where would such an expansive interpretation stop? If homeowner insurers are included within the scope of § 3604(a) (because insurance indirectly affects the availability of housing), why should the statute not apply to the work of plumbers, electricians, and carpenters? Most homeowners cannot maintain their homes without their assistance. If hazard insurers are included within the sweep of § 3604(a), why not employers? It would be hard for most people to buy or keep a house without a job. Why not, for that matter, include lawyers, who are necessary to close the transaction? The simple language "denies or otherwise makes unavailable" does not give § 3604(a) such a long reach.

Under these circumstances, no deference to HUD's interpretation of the Act with respect to property insurance is warranted. Where, as here, statutory language is clear and unambiguous, no administrative interpretation is necessary. *Demarest v. Manspeaker*, 498 U.S. 184 (1991). Even "contemporaneous and long-standing agency

interpretations must fall to the extent they conflict with statutory language." *Public Employees Retirement System v. Betts*, 492 U.S. 158, 171 (1989).

But even were this not so, deference is only to be paid to an administrative agency's interpretation of congressional intent when the matters are technical and more fully understood by specialist agencies. The deference afforded by this Court in *Chevron* to the EPA's rule at issue -- that States might adopt rules treating pollution emitting equipment within the same industrial groupings as if they were encased in a single "bubble" -- is of little help here. The Court did not defer to the agency's determination until after it had exhaustively examined the statutory language and legislative history to determine that Congress had no intent with respect to the matter at issue. *See NLRB v. United Food and Commercial Workers*, 484 U.S. 112, 123 (1987) ("our first job is to try to determine congressional intent, using 'traditional tools of statutory' construction").

The rule in *Chevron* is rooted in recognition of the EPA's technical expertise and years of experience in administering the statute in question. *Chevron*, 467 U.S. at 353-58. Where an agency interpretation is not based on an ongoing "operational program," substantial deference need not be afforded. *Cf. INS v. Cardoza-Fonseca*, 480 U.S. 421, 448 (1987) ("legal question" warrants less deference); *Bowen v. American Hospital Association*, 476 U.S. 610, 642 n.30 (1986) (*Chevron* deference "predicated on expertise").

This court should make clear that *Chevron* deference is inappropriate when an agency is determining the extent of its jurisdiction. An agency "may not bootstrap itself into an area in which it has no jurisdiction." *Adams Fruit Co.*

v. Barrett, 494 U.S. 638, 650 (1990) (citing *Federal Maritime Commission v. Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973)). To permit, in a manner of speaking, the fox to guard the henhouse, would have implications beyond the question of applicability of the Act to the business of insurance. The question here is not how best to interpret ambiguous congressional intent with respect to delegated authority, but rather, how to construe a statute. This Court should make clear that such questions are for Congress and for judicial interpretation of congressional actions, not for regulatory agencies.

Moreover, to defer to HUD here would be to let it overrule a policy judgment Congress has made. HUD has repeatedly sought to amend the Act to apply to insurance and Congress has not done so. In the course of one of those efforts, Senator Howell Heflin remarked:

> I am aware that HUD has proposed regulations under Title VIII that would cover the business of insurance, a business the Senate has decided should not be addressed by this legislation. I hope it is clear from these proceedings that HUD should not attempt to achieve by regulation what the Senate has declined to do, namely, to amend Title VIII to cover the business of insurance.

Senator Heflin was prescient. This Court should not permit HUD to succeed in its attempt to end-run around Congress, and it should make clear that there are limits on the authority of an agency to determine the scope of its own jurisdiction.

CONCLUSION

Amici curiae Washington Legal Foundation and the Allied Educational Foundation respectfully request that the petition for a writ of certiorari be granted.

Respectfully submitted,

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Dated: January 3, 1996

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No. 95-714

In The

Supreme Court of the United States

October Term, 1995

NATIONWIDE MUTUAL INSURANCE COMPANY AND NATIONWIDE MUTUAL FIRE INSURANCE COMPANY,

Petitioners,

v.

HENRY CISNEROS, SECRETARY OF THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT; JERALD L. STEED, EXECUTIVE DIRECTOR, DAYTON HUMAN RELATIONS COUNCIL; CHARLES W. BROWN, CHAIRPERSON, DAYTON HUMAN RELATIONS COUNCIL; AND CITY OF DAYTON,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

MOTION FOR LEAVE TO FILE A FRIEND OF THE COURT BRIEF and BRIEF OF THE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS AS FRIEND OF THE COURT IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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MOTION

The National Association of Insurance Commissioners moves for leave to file a Friend of the Court Brief in support of Petitioners, Nationwide Mutual Insurance Company and Nationwide Mutual Fire Insurance Company. The Friend of the Court Brief is printed with this Motion in accordance with Rule 37 of the *Rules of the Supreme Court*.

ISSUE OF CONSENT

Mr. Joel W. Rice has consented, on behalf of Petitioners Nationwide Mutual Insurance Company and Nationwide Mutual Fire Insurance Company, to the filing of a Friend of the Court Brief by the National Association of Insurance Commissioners. Mr. Ken Barden on behalf of Respondents Jerald L. Steed, Charles W. Brown, and City of Dayton refused to consent to the filing of the Friend of the Court Brief by the National Association of Insurance Commissioners, but stated that there was no objection to the filing. Consent has also been sought from The Honorable Drew S. Days III, Solicitor General. As of this date, no response has been received. If consent is granted, it will be filed with the Clerk of this Court as soon as practicable.

INTEREST OF MOVANT

The National Association of Insurance Commissioners (NAIC) is a nonprofit, unincorporated association

whose members are the principal insurance regulatory officials of the fifty states, the District of Columbia, territories and insular possessions of the United States. The NAIC seeks permission to file the attached Friend of the Court Brief in furtherance of its objectives to serve the public by assisting the several state insurance regulatory officials in improving state regulation of the business of insurance and promoting fair and equitable treatment of policyholders and claimants.

The ability of an insurer to engage in proper risk selection is a key aspect of an insurer's financial soundness. An insurer that fails to use appropriate risk selection techniques will soon find itself in financial trouble, to the detriment of policyholders and claimants relying on insurance coverage. This is due to adverse selection, in which insureds obtain coverage at too favorable a rate for the risk they represent. Since the insurer has not collected adequate premiums for these risks, claims soon exceed money available to pay those claims, leading to insolvency of the insurer.

The assertion of claims under the Fair Housing Act by the United States Department of Housing and Urban Development, especially under the so-called "disparate impact" approach, which requires no showing of discriminatory intent, makes impossible the operation of state laws establishing insurers' right to use rationally based, neutral risk selection techniques. Thus, the Court should grant the Petition for a Writ of Certiorari so that it may give full consideration to the impairment of state insurance laws caused by the claims made by the United States Department of Housing and Urban Development.

FOCUS OF BRIEFS

The Petition for Writ of Certiorari filed on behalf of Nationwide Mutual Insurance Company and Nationwide Mutual Fire Insurance Company details the disagreement among Courts of Appeal as to whether the Fair Housing Act applies to the business of insurance and whether the impairment of state insurance laws by the Fair Housing Act is ripe for decision.

The Respondents' briefs have not been filed, but they will likely focus on supporting the decision of the U.S. Court of Appeals for the Sixth Circuit. It is likely that these briefs will urge deference to the United States Department of Housing and Urban Development's determination that it has jurisdiction over property insurance matters.

Other Friend of the Court briefs may be filed. These briefs are likely to support aspects of positions taken by the Parties to the case. One or more individual insurance regulators are likely to underscore that the assertion of jurisdiction by the United States Department of Housing and Urban Development impairs, invalidates, or supersedes state insurance laws.

The NAIC takes no position as to whether the Petitioners are motivated by discrimination against a protected class. The NAIC is concerned that issues involving risk selection by property insurers be resolved under Ohio insurance laws that allow rationally based, neutral risk selection criteria. The NAIC's brief explains that the ability of insurers to engage in risk selection is the very essence of the business of insurance. The NAIC's brief also explains why the application of the Fair Housing

Act, particularly using the "disparate impact" approach, impairs, invalidates, or supersedes state insurance laws designed to promote the solvency of insurers.

CONCLUSION

The NAIC respectfully requests permission to file the attached Friend of the Court Brief in support of Petitioners Nationwide Mutual Insurance Company and Nationwide Mutual Fire Insurance Company.

Dated the 3rd Day of January, 1996

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INTEREST OF FRIEND OF THE COURT

The National Association of Insurance Commissioners (NAIC) is a nonprofit, unincorporated association whose members are the principal insurance regulatory officials of the fifty states, the District of Columbia, territories and insular possessions of the United States. The NAIC seeks permission to file the attached Friend of the Court Brief in furtherance of its objectives to serve the public by assisting the several state insurance regulatory officials in improving state regulation of the business of insurance and promoting fair and equitable treatment of policyholders and claimants.

Following a request from the Ohio Superintendent of Insurance, the Executive Committee of the NAIC, which consists of seventeen insurance commissioners from all regions of the country, voted to file a Friend of the Court Brief in this case in support of granting a Writ of Certiorari.

Insurance commissioners are charged by the McCarran-Ferguson Act, 15 U.S.C. §§ 1011 and 1012, as well as by their own state statutes, *e.g.*, Ohio Rev. Code (O.R.C.) § 3901.11, to regulate the business of insurance. Insurance commissioners regulate many different types of insurance and virtually every aspect of the business of insurance. This includes statutes designed to foster the solvency of insurers through the risk selection process such as O.R.C. § 3901.21(M), prohibiting unfair discrimination between individuals in the same classification having similar risks.

The Fair Housing Act, 42 U.S.C. §§ 3601, *et seq.*, is being used by the United States Department of Housing and Urban Development (HUD) to assert claims that

Nationwide Mutual Insurance Company and Nationwide Mutual Fire Insurance Company (collectively, Nationwide) are engaged in discrimination against a protected class, even though there is no showing that Nationwide's use of neutral risk selection criteria is motivated by this type of discrimination. While the NAIC takes no position as to whether Nationwide is motivated by discrimination against a protected class, the NAIC is concerned that issues involving risk selection by property insurers be resolved under Ohio insurance laws that allow rationally based, neutral risk selection criteria rather than a federal law that prevents Ohio laws from operating. The claims by HUD impair, invalidate, or supersede state laws such as O.R.C. § 3901.21(M) because they will stop insurers such as Nationwide from engaging in risk selection necessary to maintain insurer solvency, in the best interests of policyholders and claimants.

SUMMARY OF ARGUMENT

HUD's assertion of claims under the Fair Housing Act that permits use of the "disparate impact" approach is illegal under the McCarran-Ferguson Act. Ohio laws permit and encourage the use of rationally based, neutral risk selection criteria. This promotes insurer solvency through appropriate risk classification and accurate pricing of insurance. Ohio insurance laws also provide for the equitable allocation of risks rejected by the voluntary market through a FAIR plan.

These Ohio insurance laws are impaired, invalidated, or superseded by HUD's assertion of claims which utilize

the "disparate impact" approach. Ohio laws on risk selection and the equitable allocation of risks rejected by the voluntary market cannot be enforced if insurers are required to insure all applicants.

Lastly, the illegality of HUD's actions is ripe for consideration by the Court. HUD has issued numerous statements that it will apply the "disparate impact" approach in property insurance cases, a decision which is final for purposes of judicial review.

ARGUMENT

I. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED TO REVERSE THE DECISION OF THE U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT AND PRESERVE STATE INSURANCE LAWS WHICH PROTECT THE SOLVENCY OF INSURERS BY PROMOTING PROPER RISK SELECTION

The Sixth Circuit's decision in this case impairs, invalidates, or supersedes Ohio insurance laws designed to foster insurer solvency through appropriate risk selection criteria. Thus, the Sixth Circuit's decision is in violation of the McCarran-Ferguson Act, 15 U.S.C. §§ 1011, *et seq.* 15 U.S.C. § 1012 states that:

> (a) State regulation. The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

> (b) Federal regulation. No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance. . . .

This Court should grant the Petition for A Writ of Certiorari and reverse the Sixth Circuit's erroneous decision.

A. O.R.C. § 3901.21(M) is a state law regulating the business of insurance

Underwriting activities such as those in question in this case involve determining if an applicant for insurance is eligible to be insured, and if so, under what terms, conditions, and exclusions, and at what premium. This Court recognizes that these practices are at the very heart of the business of insurance. " . . . Congress understood the business of insurance to be the underwriting and spreading of risk." *Group Life & Health Insurance Company v. Royal Drug Company,* 440 U.S. 205, 221 (1979).

Thus, no one seriously contests that Ohio laws regulating the underwriting activities of Nationwide are state laws that regulate the business of insurance. O.R.C. § 3901.21(M) provides that:

> The following are hereby defined as unfair and deceptive acts or practices in the business of insurance:
>
> Making or permitting any unfair discrimination between individuals of the same class and of

> essentially the same hazard in the amount of premium, policy fees, or rates charged for any policy or contract of insurance, other than life insurance, or in the benefits payable thereunder, or in underwriting standards and practices or eligibility requirements, or in any of the terms or conditions of such contract, or in any other manner whatever.

A state statute designed to regulate how insurers decide whom to insure and the form of the insurance contract cannot be anything other than a law that regulates the business of insurance.

B. The Fair Housing Act does not specifically relate to the business of insurance, and, therefore, cannot invalidate, impair, or supersede state laws that regulate the business of insurance

This Court has stated that

> Obviously Congress' purpose [in adopting the McCarran-Ferguson Act] was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance. This was done in two ways. One was by removing obstructions which might be thought to flow from its own power, whether dormant or exercised, ***except as otherwise expressly provided in the Act itself or in future legislation.*** *Prudential Insurance Company v. Benjamin*, 328 U.S. 408, 429-430 (1946) (emphasis added).

The Fair Housing Act contains no express reference to insurance, and, therefore, cannot be an act of Congress that "specifically relates" to the business of insurance.

Thus, if the Fair Housing Act impairs, invalidates, or supersedes Ohio insurance laws, HUD cannot exercise jurisdiction over property insurance matters.

C. HUD's assertion of jurisdiction allows it to assert a "disparate impact" approach which impairs, invalidates, or supersedes state laws that prohibit unfair discrimination in insurance, but allow the use of rationally based, neutral risk selection techniques that promote the solvency of insurers

HUD is asserting claims that Nationwide is violating the Fair Housing Act even though Nationwide was not motivated by discrimination against a protected class, but was merely using neutral risk selection criteria permitted and encouraged under Ohio insurance laws. This impairs, invalidates, or supersedes those laws, interfering with state laws designed to promote the solvency of insurers. Therefore, HUD is applying the Fair Housing Act in violation of the McCarran-Ferguson Act.

The "disparate impact" approach, as described in HUD's own legal memoranda (Nationwide's Petition at App. 144 to App. 152), means that a facially neutral rule that disproportionately excludes members of a protected class can violate the Fair Housing Act even though the alleged violator was not motivated by discriminatory intent. This approach to enforcement of the Fair Housing Act impairs, invalidates, or supersedes Ohio insurance laws designed to promote insurer solvency through the application of neutral risk selection criteria.

The importance of state laws regulating underwriting is shown in Ettlinger, *State Insurance Regulation* at 29-30 (1995):

> Of concern to state insurance regulators is that improper underwriting can result in the following circumstances:
>
> - *An insurer could become insolvent.* Underwriting allows the insurer to analyze loss exposures to determine the likelihood and ultimate cost of any losses that might occur. Loss exposures can then be denied if they are too risky for the insurer to assume. Acceptable loss exposures are placed in the appropriate risk classification and charged the appropriate premium. If insurers often accept loss exposures when they should have denied coverage or if they frequently classify risky loss exposures as lower-risk loss exposures, insurers face financial loss, because premiums collected might be far below the amount needed to cover the losses that are incurred, and policyholders' surplus will have to be used to pay claims. If improper underwriting occurs frequently, an insurer's surplus can be drained to the point of insolvency of the insurer.
>
> - *An insured or potential insured could be improperly discriminated against.* In insurance, discrimination is not necessarily a negative term so much as a descriptive one. For insurance *fair* discrimination is not only permitted, but necessary. For example, an insurer can charge higher premiums for insureds with poor driving experience than for those with excellent driving records. However, *unfair* discrimination is not permitted.

> **Unfair discrimination** occurs when an underwriting decision is based on race, or in some states, sex. For example, in a state that does not allow discrimination based on sex, an insurer cannot charge a higher premium for a male driver than it does for a female driver who is otherwise at the same level of risk. Unfair discrimination also occurs when there is no statistical support for an underwriting decision. For example, an insurer cannot deny coverage to drivers of blue cars, because there is no data suggesting that the color of cars affects their level of risk. (Italics and bolding in original).

The assertion of claims which may use the "disparate impact" theory by HUD overthrows state laws such as O.R.C. § 3901.21(M) that allow insurers to use rationally based, neutral underwriting guidelines. These laws are swept aside and insurers exposed to punishment by the federal government even though they were merely using rationally based underwriting guidelines permitted and encouraged under state law to preserve insurer solvency.

Also destroyed by HUD's actions are state laws establishing Fair Access to Insurance Requirements (FAIR) plans, for example, O.R.C. §§ 3929.41, *et seq.* Virtually every state has a FAIR plan. Generally, they are designed to make basic property insurance available to applicants rejected by the voluntary insurance market so that risks which present a greater risk of loss may be allocated equitably among insurers authorized to transact property and casualty insurance in a state. This assures that business which represents a greater risk will not drive one or a few insurers into insolvency, but instead

the risk will be spread among all authorized property and casualty insurers.

Under the "disparate impact" theory available to HUD, this system is destroyed because risks cannot be rejected by the voluntary insurance market based on rational, neutral underwriting guidelines. Instead, an insurer must accept all applicants, without regard to effect it has on its solvency. This exposes individual insurers to the risk insolvency, a risk they avoid under FAIR plan laws such as Ohio's, which spreads the risk among all insurers, reducing the chance of insolvency.

Thus, the availability of the "disparate impact" approach invalidates, impairs, or supersedes state insurance laws and cannot be applied to Nationwide under the McCarran-Ferguson Act. Of what use is a law permitting and encouraging rationally based, neutral risk selection, if an insurer must insure all applicants? No use at all. Of what use is a law establishing a FAIR plan for the equitable distribution of risks rejected by the voluntary insurance market if that market is no longer voluntary because insurers must accept all applicants? None whatsoever. These laws have been impaired, superseded, or invalidated by HUD's assertion of the "disparate impact" approach.

HUD's sweeping aside of Ohio's unfair discrimination and FAIR plan laws show how state insurance laws intended to enhance insurer solvency are destroyed by HUD's claims, causing danger to policyholders and claimants. The Court should put an end to the impairment of Ohio insurance laws and the attendant danger to

policyholders and claimants by granting Nationwide's Petition and reversing the Sixth Circuit's decision.

II. THE FACT THAT THE FAIR HOUSING ACT IMPAIRS, SUPERSEDES, OR INVALIDATES OHIO INSURANCE LAWS IS READY FOR DECISION BY THE COURT

Acting on its own, the Sixth Circuit raised the issue of ripeness and erroneously decided this case was not ripe for decision since HUD had not yet applied the Fair Housing Act to Nationwide. In so doing, the Sixth Circuit was apparently unaware of or disregarded the fact that HUD applies the "disparate impact" approach to property insurance issues. There is no doubt as to HUD's intent to use the "disparate impact" approach to impair, invalidate, or supersede Ohio's insurance laws, making the Fair Housing Act's application to property insurance illegal under the McCarran-Ferguson Act. This makes HUD's action final and ready for judicial review.

Ripeness is the doctrine that the courts should avoid premature adjudication of issues to avoid entangling themselves in abstract disputes over administrative policies and avoid interference with administrative processes until a decision is formalized. In deciding whether a case is ripe for adjudication, the questions are whether the issues are appropriate for judicial resolution and an assessment of the hardship on the parties if judicial relief is denied at this stage. 2 Am. Jur. 2d, *Administrative Law* § 485 (1994).

Pre-enforcement judicial review is permissible to challenge a regulation or agency interpretation that has a

direct and immediate impact on a party bringing the challenge.

> For example, a rule of conduct which carries sanctions for its violation may be challenged directly in a separate proceeding. If a rule of conduct cannot be challenged in advance of violating it, persons subject to the rule are placed in a dilemma: comply with the rule that harms them and that they believe to be invalid or violate the rule at the risk of incurring a heavy penalty if they have guessed wrong and the rule is upheld in the penalty proceeding.
>
> * * *
>
> Rulings and interpretations issued by an agency head in response to nonhypothetical questions after the agency's interpretative action has come to an end are final for the purpose of preenforcement review because the review will not disrupt the orderly process of agency adjudication where the ruling, intended as a deliberative interpretation of the agency's position at the highest level on a question of importance, has issued. *Id.* at § 486.

Here, Nationwide has no choice but to comply with HUD's erroneous assertion of claims involving the "disparate impact" approach or face severe penalties. Further, HUD has left no doubt as to the application of the "disparate impact" approach to Fair Housing Act cases, especially property insurance cases. Nationwide's Petition at App. 135 to App. 152 details HUD internal memoranda, Congressional testimony, statements at public meetings, and legal memoranda filed in court, all stating unequivocally that HUD will apply a "disparate impact" approach to property insurance. In light of these documents, the

assertion that HUD's action is not final is at best intellectually dishonest.

There is no doubt the issue of whether HUD's assertion of the "disparate impact" approach to property insurance is ripe for judicial review. To state otherwise is to deny the reality of how HUD approaches property insurance cases. The Court should avoid the harm caused to policyholders and claimants by the use of the "disparate impact" approach, which weakens insurer solvency.

CONCLUSION

HUD's assertion of claims which utilize the "disparate impact" approach makes it impossible for Ohio to implement its laws permitting rationally based, neutral risk selection criteria and the equitable allocation of risks rejected by the voluntary market through its FAIR plan. These laws are vital to insurer solvency. HUD cannot use the Fair Housing Act – which does not specifically relate to insurance – to impair, invalidate, or supersede Ohio's insurance laws. The Court should grant Nationwide's Petition.

Respectfully Submitted,

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MOTION FILED

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No. 95-714

IN THE

Supreme Court of the United States

October Term, 1995

NATIONWIDE MUTUAL INSURANCE COMPANY
and
NATIONWIDE MUTUAL FIRE
INSURANCE COMPANY,

Petitioners,

v.

HENRY CISNEROS, Secretary of the United States Department of Housing & Urban Development; JERALD L. STEED, Executive Director, Dayton Human Relations Council; CHARLES W. BROWN, Chairperson, Dayton Human Relations Council; and CITY OF DAYTON,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE NATIONAL ASSOCIATION OF INDEPENDENT INSURERS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

National Association of Independent Insurers ("NAII") respectfully moves, pursuant to Rule 37.2 of the Rules of this Court, for leave to file the attached brief as *amicus curiae* in support of the petition of Nationwide Mutual Insurance Company and Nationwide Mutual Fire Insurance Company ("Nationwide") for Writ of Certiorari. Petitioners and the Office of the Solicitor General, on behalf of respondent Henry Cisneros, have consented to the filing of this brief. This motion is necessitated because counsel for respondents Jerald

L. Steed, Charles W. Brown and the City of Dayton have refused written consent.[1]

NAII is a national insurance trade association representing over 550 property and casualty insurance companies across the country. NAII is headquartered in Des Plaines, Illinois, maintains two regional offices and a Washington, D.C. office, and retains legislative counsel in nearly every state. NAII member companies are domiciled in 48 states and conduct business in all 50 states, the District of Columbia and various foreign jurisdictions.

The NAII membership reflects a broad cross-section of the property and casualty insurance industry. NAII member companies range in size from large national companies to regional companies to companies writing in a single state. Over one third of the nation's top 50 insurers are NAII members. In 1994, NAII member insurers together wrote over $65 billion in direct property and casualty premiums which represented over 26% of all property and casualty insurance underwritten in the United States.

On a national basis, 154 NAII member companies wrote homeowners insurance in 1994 for a total of over $7.4 billion in direct premiums or nearly 31% of the national homeowners insurance market. The number of NAII member companies writing homeowners insurance increased over 40% during the years 1988 to 1993 and the number of such companies continues to climb. Currently, over 280 NAII member companies (over 50% of all NAII members) write homeowners insurance.

As a national insurance trade association, NAII seeks to promote the economic, legislative and public standing of the

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1. Although the above-referenced respondents have refused to provide such consent to NAII, it is NAII's understanding that these respondents recently have informed this Court by letter, dated December 29, 1995, that they "do not object to the filing of an amicus brief in this matter."

insurance industry; to provide a forum for discussion of problems which are of common concern to its members; to keep members informed of regulatory and legislative developments; and to serve the public interest through appropriate activities, including the promotion of safety and security of persons and property.

Because it can draw on the collective knowledge of its broad-based membership, NAII has the unique ability to serve as a source of a wealth of objective, specialized information concerning the complex economic structure of the insurance business. NAII collects information concerning various aspects of the insurance business and distributes that information to various entities, including insurance companies, state insurance departments and government agencies. Indeed, NAII is a state-authorized statistical reporting agency. Among other things, NAII's data compilations reflect the loss experience of a major segment of the insurance industry.

NAII and its members have a substantial interest in the issues raised by the lower court's decision in *Nationwide Mut. Ins. Co. v. Cisneros*, 52 F.3d 1351 (6th Cir. 1995). As detailed more fully in the attached memorandum, that court's decision that property and hazard insurance practices are governed by the Fair Housing Act ("FHA") will have a profound effect on NAII members and the property and casualty insurance industry in general.

The continuing uncertainty as to whether the FHA applies to insurance practices has created an enormous dilemma for the entire property and casualty insurance industry. Insurers must choose between attempting to reconfigure their business in a manner consistent with the Department of Housing and Urban Development's regulatory structure, an approach likely to substantially change their businesses in ways that may be inconsistent with basic financial soundness considerations and the existing state

regulatory structure, or leaving themselves vulnerable to prohibitively costly government investigations and enforcement actions and/or private litigation brought under the FHA. Indeed, several NAII member companies already have become the target of federal investigations and/or civil actions, including class actions, pursuant to the FHA. Thus, a proper resolution of the conflict among the circuits regarding whether the FHA applies to insurers will provide much needed guidance for NAII and its members.

Because of the distinct perspective NAII can offer in connection with these issues based on its specialized knowledge of the insurance industry, and because of NAII's strong interest in these issues and their effect on its members, NAII respectfully moves for leave to submit the attached brief to assist the Court in its determination whether to grant further review.

Respectfully submitted,

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BRIEF OF THE NATIONAL ASSOCIATION OF INDEPENDENT INSURERS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF INTEREST OF THE AMICUS CURIAE

The interest of the *amicus curiae* is set forth in the motion accompanying this brief.

INTRODUCTION

The central issue raised by the decision below is whether the Department of Housing and Urban Development ("HUD") may establish by regulatory fiat that the Fair Housing Act, 42 U.S.C. § 3601, *et seq.* (the "FHA" or "Act") applies to the property and hazard insurance business.[1] This issue is clearly and unequivocally ripe for review by this Court. The Sixth Circuit's split panel decision permitting HUD to regulate the business of property and hazard insurance under the FHA[2] has perpetuated a decade of conflict among the Courts of Appeal as to whether Congress, which enacted the FHA in 1968 and subsequently declined on at least four separate occasions to expand the Act's reach to property insurance, intended to permit HUD to redefine the Act's scope to reach insurance practices.

The prompt and final resolution of the issue is one of substantial importance to the property insurance industry and to the millions of American homeowners who purchase property insurance. Absent clear direction from this Court,

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1. Because HUD and some courts have consistently included the term "hazard insurance" in describing the types of insurance purportedly covered by the FHA, NAII uses the term in this brief where necessary to avoid confusion. The term "hazard insurance," however, is not commonly used by the insurance industry. The terms more commonly used to describe the types of insurance provided to homeowners in multiperil homeowners policies are "property and casualty" insurance, and the large group of insurers who provide such insurance are part of the "property and casualty" insurance industry.

2. *Nationwide Mut. Ins. Co. v. Cisneros*, 52 F.3d 1351 (6th Cir. 1995), App. 1. References to the Appendix filed by Petitioners are abbreviated herein as "App.". References to the Joint Appendix filed by the parties with the Court of Appeals are abbreviated herein as "JA".

the property insurance industry will confront continued uncertainty as to whether the law requires that it abandon the state sanctioned risk-based underwriting system that is currently used in order to acquiesce to HUD's aggressive use of the FHA to establish a new layer of federal regulations intended to advance HUD's social policy agenda. Hence the issue presented raises a public policy dilemma this Court is uniquely positioned to address—the conflict between the long-standing policy in favor of state regulation of insurance to ensure a fair and equitable risk-based underwriting and pricing system that promotes financial soundness on the one hand and HUD's interest in expansive regulation of market practices to achieve social policy objectives on the other.

For these reasons, NAII, on behalf of its over 550 property and casualty insurance company members, respectfully requests that the Court grant the Petition of Nationwide Mutual Insurance Company and Nationwide Mutual Fire Insurance Company ("Nationwide") for Writ of Certiorari.

BACKGROUND OF THE ACTION

Congress enacted the Fair Housing Act in 1968 to "eliminate discriminatory practices of property owners, real estate brokers, builders and home financers." *Mackey v. Nationwide Ins. Cos.*, 724 F.2d 419, 423 (4th Cir. 1984) (citing Sen. Mondale, the Act's sponsor (Cong. Rec. S. 2272-2284) (daily ed. Feb. 6, 1968)). In accord with these purposes, Section 3604(a) and (b) of the FHA state that it shall be unlawful:

> (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.

> (b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.

42 U.S.C.A. § 3604(a) and (b) (West 1994).[3] In its original version, section 3605 specifically prohibited discrimination in the financing of housing.[4] Notwithstanding the fact that section 3605 has since undergone substantial amendment to increase the scope of its coverage to include certain specifically identified "real estate-related transactions,"[5] neither it nor any other section of the FHA has ever contained a single reference to property or hazard insurance.

Since 1968, however, HUD, which is charged with administering the Act, has repeatedly ignored the will of Congress and sought to establish by regulatory fiat the applicability of the FHA to the business of property insurance. HUD's efforts to expand the reach of the FHA beyond the intent of Congress began in 1978 when HUD issued a memorandum opining that the FHA applies to property and hazard insurance, thus deeming itself to have regulatory jurisdiction over such matters.[6] However, in 1984, the Fourth Circuit categorically rejected HUD's interpretation and held that Congress did not intend that the FHA apply to property and hazard insurance. *Mackey*, 724 F.2d at 424. The Fourth Circuit stated that "the legislative history [of the FHA]

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3. Sections 3604(a) and (b) have not been materially modified since their enactment, except for the addition of "familial status" as a prohibited basis of discrimination. *Id.* (as amended in 1988).

4. Fair Housing Act, Pub. L. No. 90-284, § 805, 82 Stat. 73 (1968) (current version at 42 U.S.C. § 3605).

5. Fair Housing Amendments Act of 1988, Pub. L. 100-430, § 805, 102 Stat. 1622 (1988) (current version at 42 U.S.C. § 3605).

6. *See* Mem. to C. McGuire, HUD Asst. Sec. for Equal Opportunity from R. Prokop, General Counsel of HUD, dated August 25, 1978, JA 372-375.

contains no discussion of a barrier to fair housing created by the insurance industry." *Id.* at 423.

Consistent with the *Mackey* decision, Congress has rejected numerous attempts by HUD allies to amend the FHA to bring insurance activities within its scope. For example, Congress, while amending section 3605 of the Act in 1988 to include businesses that engage in certain real-estate related transactions, such as appraisal and secondary market activities, rejected an amendment that also would have included property and hazard insurance.[7]

Undaunted by its failure to reverse the will of Congress, HUD determined to pursue its goal by regulatory fiat. It issued regulations in 1989 granting itself the authority it was not able to secure from Congress to regulate the business of insurance under the FHA. HUD construed section 3604 to include, among other things, "[r]efusing to provide...property or hazard insurance for dwellings or providing such...insurance differently because of race, color, religion, sex, handicap, familial status, or national origin." 24 C.F.R. § 100.70(d)(4) (1995) (referred to herein as "the 1989 Regulation"). Based upon this self-proclaimed and unwarranted expansion of authority under the FHA, HUD has initiated an aggressive FHA enforcement effort directed at insurers.

In the decision below, the Sixth Circuit, in a 2-1 split, deferred to HUD's view that the FHA applies to property and hazard insurance based on the mistaken view that this Court's analysis set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (hereinafter the "*Chevron* analysis") required such a result. *Nationwide Mut.*

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7. *Compare* H.R. 1158, 100th Cong., 1st Sess. (1987) and S. 558, 100th Cong., 1st Sess. (1987) with Fair Housing Amendments Act of 1988, Pub. L. 100-430, § 805, 102 Stat. 1622 (1988) (current version at 42 U.S.C. § 3605); *see also* H.R. Rep. No. 711, 100th Cong., 2d Sess. 12 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173.

Ins. Co. v. Cisneros, 52 F.3d 1351, 1356-59 (6th Cir. 1995), App. 8-15.[8] The dissenting opinion adopted the view of the Fourth Circuit in *Mackey* that Congress' intent was that the FHA does not apply to insurance. On this basis it found that the *Chevron* analysis did not apply. *See Nationwide*, 52 F.3d at 1364, App. 29 (Kennedy, J., dissenting). Thus, the Sixth Circuit's split decision deepened the conflict among the Courts of Appeal on this issue, perpetuating continuing confusion as to whether Congress' clear legislative intent to continue to recognize the principal of state regulation of insurance or HUD's overbroad interpretation of the FHA is controlling.[9]

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8. In so doing, the Sixth Circuit majority relied substantially on the Seventh Circuit's decision in *N.A.A.C.P. v. American Family Mut. Ins. Co.*, 978 F.2d 287 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 2335 (1993), which reached the same conclusion.

9. This *amicus* memorandum focuses primarily on the necessity for this Court to resolve the conflict among the circuits concerning whether Congress intended the FHA to apply to property insurance. NAII, however, fully supports those arguments stated by Petitioners and other *amici* in requesting this Court to review whether a disparate impact enforcement of the FHA is preempted by the McCarran-Ferguson Act as well as the Sixth Circuit's holding that the McCarran-Ferguson Act does not otherwise preempt the application of the FHA to insurance practices.

REASONS FOR GRANTING WRIT

I. THE DECISION BELOW HAS PERPETUATED A CONFLICT AMONG THE CIRCUITS REGARDING THE APPLICATION OF THE FHA TO INSURANCE PRACTICES.

In reaching its decision, the court below rejected the Fourth Circuit's well-reasoned analysis in *Mackey* that Congress did not intend the FHA to apply to insurance activities. In contrast, both the majority below and the Seventh Circuit in *American Family* applied a *Chevron* analysis in concluding that the 1989 Regulation is a reasonable construction of the FHA. *Nationwide*, 52 F.3d at 1356-60, App. 8-19; *N.A.A.C.P. v. American Family Mut. Ins. Co.*, 978 F.2d 287, 297-301 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 2335 (1993).

This Court has clearly stated, however, that the *Chevron* analysis regarding deference to an agency does not apply where, as here, the issue of Congressional intent involves a "pure question of statutory construction" and the Court can ascertain such intent by "employing traditional tools of statutory construction." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446-48 (1987); *see also Nationwide*, 52 F.3d at 1364, App. 29 (Kennedy, J., dissenting). Thus, there exists a clear conflict among the Circuits (and within the panel below) concerning whether Congress has expressed an intent that the property insurance industry not be subject to an additional layer of federal regulation under the FHA.[10]

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10. *Compare Mackey*, 724 F.2d at 424 (concluding that "the [FHA] as enacted in 1968 was not intended to reach the hazard insurance industry") with *American Family*, 978 F.2d at 298 ("Congress created ambiguity" in the FHA). *Compare also Nationwide*, 52 F.3d at 1359, App. 15 (majority) ("plaintiffs have failed to show any evidence of Congressional intent to preclude the application of the [FHA] to insurance underwriting practices") with *Nationwide*, 52 F.3d at 1364, App. 29 (Kennedy, J., dissenting) (finding that *Chevron* analysis unnecessary where "this Court

II. THIS CASE PRESENTS AN OPPORTUNITY TO ADDRESS THE CONFLICT AMONG THE CIRCUITS REGARDING HUD'S IMPROPER EFFORT TO EXPAND THE FHA'S SCOPE IN CONTRAVENTION OF CLEAR CONGRESSIONAL INTENT.

The conflict among the Courts of Appeal discussed above reflects the dramatically divergent views of Congress and HUD regarding the scope of the FHA. Only by disregarding the legislative context in which the FHA was enacted, relevant subsequent legislation, and other federal legislation defining a limited federal role in the regulation of insurance did the split panel of the court below find that Nationwide "failed to show any evidence of Congressional intent to preclude the application of the Fair Housing Act to insurance underwriting practices." *Nationwide*, 52 F.3d at 1359, App. 15. Without action by this Court reversing this plainly incorrect finding, the property insurance industry will continue to be subject to HUD's improper exercise of regulatory authority under the FHA and to inherently inconsistent federal and state regulatory schemes.

A. The Plain Language Of FHA Sections 3604 And 3605 Taken Together Establishes That Congress Did Not Intend To Include Insurance Activities Within The Act's Scope.

It is undisputed that the FHA does not specifically include property or hazard insurance within its ambit. Moreover, as the *Mackey* court held, the fact that section 3604(a) makes it unlawful to refuse to sell, rent or "otherwise make unavailable a dwelling" on a discriminatory basis does

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can ascertain Congressional intent through traditional tools of statutory construction" and that Congress did not intend FHA to apply to property insurance practices) (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987)).

not render Congress' intent ambiguous as to whether property insurance activities are included within the scope of section 3604. *Mackey*, 724 F.2d at 423.[11] Section 3604 must be read in conjunction with section 3605, which as originally enacted, limited the FHA's scope with respect to activities which only indirectly affect the availability of housing to mortgage financing. *Id.* Thus, the Sixth Circuit's interpretation of section 3604 to include property insurance practices reads section 3605 out of the Act. As stated by the Fourth Circuit in *Mackey*, "if § 804 [3604] was designed to reach every discriminatory act that might conceivably affect the availability of housing, § 805's [3605's] specific prohibition of discrimination in the provision of financing would have been superfluous." *Id.*

As the dissent in the lower court recognized, the clear merit of the *Mackey* holding was reinforced when Congress more directly addressed the scope of the FHA with respect to "real estate-related transactions" in its 1988 amendments to the FHA and, in doing so, reiterated its intent that property insurance not be included within the Act's scope. *Nationwide*, 52 F.3d at 1364, App. 29 (Kennedy, J., dissenting); *see* 42 U.S.C.A. § 3605 (West 1994) (historical and statutory notes). Such transactions are now clearly

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11. Although the *American Family* court and the court below made brief references to an argument that the term "service" in section 3604(b) is undefined and that property insurance could be interpreted to constitute a "service" rendered in connection with the sale or rental of a dwelling under section 3604(b), both the Sixth and Seventh Circuits based their decisions that the FHA is applicable to property insurance primarily on section 3604(a)'s prohibition against "otherwise mak[ing] unavailable a dwelling." *See Nationwide*, 52 F.3d at 1356-60, App. 6-19; *American Family*, 978 F.2d at 297-301. In any event, property or hazard insurance does not constitute a "service" provided in connection with a dwelling. As the *Mackey* court noted, any contention otherwise requires a "strained interpretation of the word." *Mackey*, 724 F.2d at 424 ("what the [hazard] insurance industry does cannot reasonably be described as the provision of a service in connection with dwellings").

limited to "[t]he making or purchasing of loans or providing other financial assistance" and "[t]he selling, brokering or appraising of residential real property." 42 U.S.C.A. § 3605(b) (West 1994).

B. The Legislative History Of The FHA And Its Amendments Further Support The Conclusion That Congress Did Not Intend To Include Insurance Practices Within The Act's Scope.

As the *Mackey* court noted, "the legislative history [of the FHA] contains no discussion of a barrier to fair housing created by the insurance industry." *Mackey*, 724 F.2d at 423 (noting that the bill's sponsor stated only that the FHA "was necessary to eliminate discriminatory practices of property owners, real estate brokers, builders and home financers."). Indeed, the only reference to property insurance during the debate of the Act was the unopposed assertion that the FHA does *not* apply to "title insurance or fire, casualty and other insurance." 114 Cong. Rec. 9603 (1968).

The court below treated the lack of statutory language or of debate indicating any congressional intention to include insurance practices as insignificant and gave short shrift to the legislative context in which the FHA was passed. *Nationwide*, 52 F.3d at 1358-59, App. 13-14. However, the failure of Congress to debate the FHA's application to insurance is particularly telling in light of the fact that Congress has legislated and steadfastly adhered to a strong public policy preference in favor of state regulation of the insurance business.[12] In this context, it strains credulity to assert that Congress intended to so profoundly affect the insurance industry in enacting the FHA without so much as a

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12. *See* McCarran-Ferguson Act, § 2(b), 15 U.S.C.A. § 1012(b) (1945) (precluding constructions of federal law which would "invalidate, impair, or supersede" state insurance regulation, unless the federal law "specifically relates to the business of insurance").

reference to the McCarran-Ferguson Act and the policy in favor of state regulation of insurance. *See Nationwide*, 52 F.3d at 1364, App. 29 (Kennedy, J., dissenting) ("I do not believe that Congress would have intended to include insurance practices without at least considering the limitations imposed by the McCarran-Ferguson Act").

Indeed, when Congress enacted the FHA it "was not unaware of the problem of the unavailability of hazard insurance in some urban areas." *Mackey*, 724 F.2d at 424. Rather than addressing the issue in the FHA, Congress instead chose to address it through the Urban Property Protection and Reinsurance Act of 1968 ("UPPRA"), which created incentives for states to adopt plans to provide insurance coverage for troubled urban areas ("FAIR plans"). Urban Property Protection and Reinsurance Act, 12 U.S.C.A. § 1749bbb, *et seq.* (West 1989 & Supp. 1995). The legislative history of UPPRA demonstrates that the same Congress that passed the FHA took specific note of the McCarran-Ferguson implications when it intended to pass legislation affecting the business of insurance. There, Congress made clear that UPPRA "is not designed to replace or alter the existing structure of the insurance industry or its regulation by the individual States."[13]

The legislative history accompanying later amendments to the FHA has served only to reinforce that Congress did not intend that the Act be applied to insurance. Since its original enactment, Congress has rejected at least four attempts to amend the FHA to permit federal regulation of insurance practices.[14] For example, after HUD's General Counsel

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13. H.R. Rep. No. 1585, 90th Cong., 2d Sess. (1968), *reprinted in* 1968 U.S.C.C.A.N. 2873, 2957.

14. *See, e.g.*, H.R. 3504, 95th Cong., 2d Sess. (1978); S. 506, 96th Cong., 1st Sess. (1979); H.R. 5200, 96th Cong., 2d Sess. (1980); 126 Cong. Rec. 32,989 (1980); S. 1220, 98th Cong., 1st Sess. (1983); H.R. 3482, 98th Cong., 1st Sess. (1983); S. 2040, 99th Cong., 2d Sess. (1986); H.R. 4119, 99th Cong., 2d Sess. (1986); H.R. 1158, 100th Cong., 1st Sess.

issued a 1978 memorandum opining that the FHA applied to property insurance activities,[15] the Senate rejected an amendment which sought to make the FHA applicable to property insurers. Indeed, Senator Howard Heflin noted:

> I am aware that HUD has proposed regulations under title VIII that would cover the business of insurance—a business the Senate has decided should not be addressed by this legislation. I hope it is clear from these proceedings that HUD should not attempt to achieve by regulation what the Senate has declined to do, namely, to amend title VIII to cover the business of insurance.

126 Cong. Rec. 32,991 (1980).

As discussed above, through the vehicle of the 1988 FHA amendments, Congress dealt the final legislative blow to any interpretation of the FHA which includes property insurance within its scope. Four years after *Mackey*, Congress once again rejected an amendment that would have brought insurance activities within the scope of the Act.[16] However, Congress concurrently amended section 3605 of the Act to include other real-estate related transactions, such as appraisals and loan purchases by the secondary market, within its scope. *See generally* H.R. Rep. No. 711, 100th Cong., 2d Sess., *reprinted in* 1988 U.S.C.C.A.N. 2173.

The lower court asserts that the 1988 FHA amendments support its finding that there is no evidence of congressional intent not to include property insurance within the ambit of the FHA because "Congress gave HUD the authority to

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(1987); H.R. Rep. No. 711, 100th Cong., 2d Sess. 12 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173; *see also* 141 Cong. Rec. S14,361 (daily ed. Sept. 27, 1995) (citing letter from Congressman Dingell to HUD Secretary Cisneros, dated Nov. 3, 1994, referencing four rejected attempts to amend FHA to include insurance).

15. Mem. to C. McGuire, HUD Asst. Sec. for Equal Opportunity from R. Prokop, General Counsel of HUD, dated August 25, 1978, JA 372-75.

16. *See supra*, n. 7.

promulgate regulations knowing that HUD had consistently interpreted the Act as governing insurance underwriting practices." *Nationwide*, 52 F.3d at 1359, App. 15. Far from approving of HUD's interpretation that the FHA applies to insurers, however, Congress again rejected an amendment that adopted such an interpretation knowing that the *Mackey* court had held that insurance was not included in the Act.

The language of the FHA, the legislative context in which it was enacted and the subsequent legislation and its related legislative history demonstrate conclusively that Congress does not intend the Act to be used to regulate the business of property insurance. Accordingly, it is uniquely appropriate that this Court resolve the split among the Courts of Appeal, and in the panel below, concerning whether HUD may properly use the FHA to create for itself a regulatory role over the property insurance business.

III. THE DECISION BELOW RAISES ISSUES OF SUBSTANTIAL IMPORTANCE TO THE INSURANCE INDUSTRY AND ITS CONSUMERS.

The property insurance industry is comprised of over 1,100 companies that wrote approximately $30 billion in direct homeowners multiperil and/or fire insurance premiums in the United States in 1994[17] as well as thousands of other related small businesses and individuals, including insurance agents, brokers, claims adjusting firms, actuarial firms and rating services.[18] Purchasers of property insurance include the residents of the estimated 75.8 million insured housing units in the country.[19] Without instruction from the Court concerning whether the FHA can be used by HUD and others to impose an additional layer of regulation on the property and hazard insurance industry, the industry will be faced with continuing uncertainty regarding the source and scope of its legal obligations and millions of insurance consumers will be required to absorb the significant economic costs of such regulatory uncertainty.

The property insurance industry is unique. Unlike most product or service providers, insurers must set their prices without full knowledge of their product's cost and must

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17. Best DataBase Services: P/C Experience By State (By Line), A.M. Best Company, Inc. (1995). Homeownership multiperil policies accounted for approximately $24.2 billion of this amount. *Id.*

18. HUD has solicited comments concerning the "[e]ntities and individuals who should be covered by the [FHA] . . . such as mutual and stock companies, independent agents, direct writers, exclusive agents, and rating services." *See* Discrimination in Property Insurance Under the Fair Housing Act, Advance Notice of Proposed Rulemaking, 59 Fed. Reg. 41995, 41996 (1994).

19. This estimate is based on an extrapolation of data collected by NAII from its subscriber companies, which account for approximately 39% of the relevant market.

project future costs by analyzing loss experience data.[20] This analysis results in the classification of like risks based on a number of objective variables, including among many others the condition and use of the property insured, the loss experience for similar properties and exposure to environmental hazards.[21] In pricing a product, an insurer determines its risk by assessing average losses for the type of property being insured.[22] Similarly, insurers develop and use underwriting standards based on loss experience to categorize, accept and reject individual risks for particular property types.[23] This pricing and underwriting structure has been developed over a number of years by the insurance industry and state regulators consistent with state law regarding financially sound business practices *and* fair (non-discriminatory) trade practices.[24]

This carefully developed insurance underwriting and pricing system, which is heavily regulated by state insurance commissions, would need to be abandoned to meet the FHA requirements as interpreted by HUD. Specifically, HUD has taken the position that the disparate impact legal doctrine developed in Title VII cases should apply in FHA cases.[25] As

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20. M. Duncan, National Association of Independent Insurers, THE FAIR HOUSING ACT & PROPERTY INSURANCE: THE CALL FOR CONGRESSIONAL ACTION (hereinafter, "THE FHA & PROPERTY INSURANCE") (October, 1995) 1-2.

21. *Id.; see also* JA 344, 386.

22. M. Duncan, THE FHA & PROPERTY INSURANCE 1.

23. *Id.*

24. JA 342-46.

25. There is a significant dispute as to whether the disparate impact theory applies to private entities in the FHA context. At least some courts have questioned whether plaintiffs should be allowed to establish FHA claims based solely on a showing of disparate impact absent discriminatory intent. *See, e.g., Brown v. Artery Org.*, 654 F. Supp. 1106, 1114-16 (D.D.C. 1987) (holding private landlords liable "for the racial effects of their housing conversions *irrespective of their purpose or intent* . . . would . . . be likely to halt in their tracks most, if not all, private efforts to upgrade deteriorated housing") (emphasis in original); *Village of*

HUD interprets this doctrine, neutral business practices such as the insurance industry's underwriting and pricing policies constitute illegal discrimination under the FHA when members of any protected class are adversely impacted unless the business can demonstrate both that there is a compelling need for the practice *and* that there is no alternative business practice it could use which would not have such an impact.[26] Under this disparate impact legal analysis, any risk-based pricing or underwriting factor that has greater impact in urban than suburban jurisdictions (e.g., age of property or

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Bellwood v. Dwivedi, 895 F.2d 1521, 1533 (7th Cir. 1990) ("[w]hether the [disparate impact] analogy works, especially after [*Wards Cove*] . . . is not a question we need decide"); *United States v. Weiss*, 847 F. Supp. 819, 826 (D. Nev. 1994) (" 'there is no indication that Congress had in mind the far reaching consequences of the [effects test] . . . on private landlords or developers' ") (citations omitted); *Boyd v. Lefrak Org.*, 509 F.2d 1110, 1113 (2d Cir. 1975) ("we will not impose an affirmative duty on the private landlord to accept low income tenants absent evidence that his motivation is racial rather than economic in origin"); *see also* American Bankers Association, FEDERAL LAW PROHIBITING LENDING DISCRIMINATION AND THE DEPARTMENT OF JUSTICE LENDING DISCRIMINATION ENFORCEMENT PROGRAM (1995) 55-57.

26. *See generally* Brief for the Secretary as Respondent, *HUD v. Mountain Side Mobil Estates*, 56 F. 3d 1243 (10th Cir. 1995) (No. 94-9509), in which HUD vigorously advocated the use of its flawed interpretation of the disparate impact theory in a housing discrimination action. It is without question that HUD intends to apply the disparate impact theory in the insurance context as well. *See, e.g., Hearing on Homeowners Insurance Discrimination Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 103d Cong., 2d Sess. (1994) (statement of Roberta Achtenberg, Asst. Sec. for Fair Housing and Equal Opportunity) (May 11, 1994) at 6 ("[t]he standards to determine discrimination in [the insurance context]—as in all other covered areas—will be based on the principles of overt discrimination, disparate treatment, and *disparate impact*") (emphasis added); Discrimination in Property Insurance Under the Fair Housing Act; Advance Notice of Proposed Rulemaking: Notice of Extension of Public Comment Deadline, 59 Fed. Reg. 52104, 52105 (1994) (HUD requesting comments regarding "[insurance] [u]nderwriting practices that may discriminate due to . . . disparate impact").

environmental hazards) can be deemed racially discriminatory.[27] Similarly, practices adopted by insurers to limit fraudulent claims, such as refusing to provide replacement coverage where replacement cost far exceeds property value, often would be prohibited as discriminatory.[28]

Thus, so long as there remains uncertainty concerning the applicability of the FHA to the property insurance industry, insurers are left to confront an inherently inconsistent dual regulatory structure where the state regulatory authorities require that property insurance be priced to reflect risk, while HUD and private litigants attack underwriting and pricing standards based on demonstrable risk factors where they are perceived to adversely impact members of a protected class. The resulting dilemma has far-reaching implications for the property insurance industry. Where insurers abandon risk-based underwriting and pricing to address HUD's regulatory mandate, they must either expose themselves to increased economic risk or impose higher insurance costs on all property insurance consumers without regard to the risks being underwritten.[29]

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27. Concerns about coverage implications in urban areas resulting from risk-based pricing and underwriting have been addressed in the existing regulatory structure through implementation of "FAIR" plans (fair access to insurance requirements). Under typical FAIR plans, state-regulated insurers contribute to a mandatory pool of insurance for certain otherwise uninsurable properties and the risk of loss is distributed proportionally among all insurers. *See* M. Duncan, THE FHA & PROPERTY INSURANCE 15; *see also* JA 387-389, 449-51.

28. *See, e.g., Hearing on Homeowners Insurance Discrimination Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 103d Cong., 2d Sess. (1994) (statement of Roberta Achtenberg, Asst. Sec. for Fair Housing and Equal Opportunity) (May 11, 1994) at 5.

29. As the Magistrate Judge in the district court in this action recognized, "[a]n insurer's underwriting standards provide the foundation for daily decisions whether to insure and at what rate to insure. Clearly, then, HUD's regulation *affects the primary business of insurers*. On the other hand, compliance with the HUD regulation, if it is invalid, could

Where an insurer declines to abandon the state-approved underwriting and pricing guidelines under which it now operates, it confronts a likelihood of protracted government investigations and/or class action litigation. This concern is not hypothetical. A number of property insurers currently are the target of HUD enforcement actions and are subject to the threat of multimillion dollar class action litigation premised on HUD's aggressive interpretation of the requirements the FHA places upon the insurance industry.[30] For example, it is publicly disclosed that HUD currently is pursuing investigations of major insurers under its purported FHA jurisdiction.[31] In addition, private litigants are pursuing actions, including class actions, against insurers based on HUD's interpretation of the reach of the FHA and the disparate impact legal theory.[32] Such actions can have

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cause insurers unnecessarily to bind themselves to cover risks they would otherwise have refused to accept." App. 41 (emphasis added).

30. HUD has established a special unit to handle property insurance issues arising under the FHA and held hearings throughout the country in connection with its initial intentions to promulgate regulations that would affect most aspects of the business of property and hazard insurance, including underwriting, sales and marketing policies and practices. *See Hearing on Homeowners Insurance Discrimination Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 103d Cong., 2d Sess. (1994) (statement of Roberta Achtenberg, Asst. Sec. for Fair Housing and Equal Opportunity) (May 11, 1994) at 5; Discrimination in Property Insurance Under the Fair Housing Act; Advance Notice of Proposed Rulemaking, 59 Fed. Reg. 41995 (1994); *see also Hearing Before the House Comm. on the Judiciary*, 103d Cong., 2d Sess. (1994) (statement of Roberta Achtenberg, Asst. Sec. for Fair Housing and Equal Opportunity) (Sept. 28, 1994).

31. *Hearing on Homeowners Insurance Discrimination Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 103d Cong., 2d Sess. (1994) (statement of Roberta Achtenberg, Asst. Sec. for Fair Housing and Equal Opportunity) (May 11, 1994) at 7-8.

32. Private individuals may file a civil action for relief after the occurrence or termination of an allegedly discriminatory housing practice. 42 U.S.C.A. § 3613(a)(1)(A) (West 1994). The current state of uncertainty concerning whether the FHA applies to insurance practices

devastating consequences for an insurer. Insurers must not only confront the public opprobrium of being labeled as racists based on the alleged impact of their use of objective risk factors in making pricing and coverage decisions, but are also exposed to the tremendous costs associated with defending such actions and to the threat of substantial liability under the FHA.[33]

In addition, such actions are being used to accomplish social engineering objectives that extend well beyond regulating the use of risk-based pricing and coverage standards by insurers to the regulation of nearly every aspect of the business of insurance, including marketing, sales, office placement and hiring practices. For example, insurance companies that want to resolve costly government investigations and private litigation have been compelled to institute affirmative marketing programs, which among other things set quotas regarding the type, size and frequency of advertisements to be placed in minority publications and aired on minority radio stations; mandate the distribution of special notices concerning insurance products to designated minority communities; set quotas regarding the number of sales agents placed in minority communities; and require insurers to compile and present to the government and private plaintiffs lists of minority groups with whom the insurers are then mandated to establish relationships. At least one insurer also has been required to subsidize interest rates and provide financing cost assistance for loans to low and moderate income African-Americans to purchase, repair and improve

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provides class action plaintiffs with a special incentive to engage in forum-shopping to bring actions against insurers in jurisdictions where the FHA has been held applicable to insurance practices.

33. The FHA permits the award of injunctive relief, compensatory and punitive damages and civil penalties, and assessment of litigation costs and attorney fees. *See* 42 U.S.C.A. § 3613(c) (West 1994) (relief available in private actions) and *id.* § 3614(d) (West 1994) (relief available in enforcement actions by Attorney General).

homes. *See generally* Consent Decree, *United States v. American Family Mut. Ins. Co.*, Civ. Act. No. 90-C-0759 (E.D. Wis. March 30, 1995).

For all these reasons, it is clear that continuing uncertainty concerning whether HUD has the legal authority to abrogate risk-based coverage practices has substantial and important implications for the thousands of businesses who comprise the insurance industry as well as the millions of homeowners who are consumers of property insurance products. It is therefore imperative that the Court accept certiorari in this matter.

CONCLUSION

For the foregoing reasons, as well as those presented by Petitioners, the *amicus curiae* request this Court to grant the petition for Writ of Certiorari.

Respectfully submitted,

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No. 95-714

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

NATIONWIDE MUTUAL INSURANCE COMPANY and NATIONWIDE MUTUAL FIRE INSURANCE COMPANY,
Petitioners,

v.

HENRY CISNEROS, Secretary of the United States Department of Housing and Urban Development; JERALD L. STEED, Executive Director, Dayton Human Relations Council; CHARLES W. BROWN, Chairperson, Dayton Human Relations Council; and CITY OF DAYTON,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE FOR THE NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES AND THE AMERICAN INSURANCE ASSOCIATION IN SUPPORT OF THE PETITION

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

Pursuant to S. Ct. Rule 37.2, the National Association of Mutual Insurance Companies ("NAMIC") and the American Insurance Association ("AIA") move for leave to file the attached brief amici curiae in support of the petition. Petitioners and the Solicitor General, on behalf of the federal respondent, have consented to the filing of this brief. The Dayton respondents have not consented, necessitating this motion.

NAMIC was founded in 1895 and currently has over 1200 member insurance companies underwriting all lines of insurance, including homeowners' insurance. NAMIC's

membership represents the full spectrum of property and casualty insurance companies, from large insurers with a national presence, to regional and mid-sized companies, to farm mutuals and niche insurers. NAMIC's members account for nearly 30 percent of all direct written property and casualty insurance premiums in the United States. NAMIC's purposes are to promote a financially stable and competitive private insurance industry, and to benefit member companies through government relations, educational services, and insurance and employee benefit programs.

AIA is a national trade organization representing more than 260 companies writing property and casualty insurance in every state and jurisdiction of the United States. These companies provide 27 percent of all property and casualty insurance underwritten in the United States, and write more than 14 percent of the total homeowners' insurance premiums written nationwide. AIA companies are affiliated with independent insurance agents throughout the country. AIA's purposes are to promote the economic, legislative and public standing of its members and the insurance industry; to provide a forum for discussion of problems which are of common concern to its members; to keep members informed of regulatory and legislative developments; and to serve the public interest through appropriate activities including the promotion of safety and security of persons and property.

One way in which NAMIC and AIA promote the interests of their members is by participating as amicus curiae in cases where the outcome will have important and far-ranging consequences for the industry, far beyond the interests of any particular insurer.* This is such a case.

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* *See, e.g., Pacific Mutual Life Ins. Co.* v. *Haslip*, 499 U.S. 1 (1991) (NAMIC amicus brief); *Browning-Ferris Indus.* v. *Kelco Disposal, Inc.*, 492 U.S. 257 (1989) (same); *Director, Office of Workers' Compensation Programs* v. *Greenwich Collieries*, 114 S. Ct. 2251 (1994) (AIA amicus brief); *FTC* v. *Ticor Title Ins. Co.*, 504 U.S. 621 (1992) (same).

By siding with the Seventh Circuit's decision in *NAACP* v. *American Family Mutual Ins. Co.*, 978 F.2d 287 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 2335 (1993), and expressly rejecting the Fourth Circuit's decision in *Mackey* v. *Nationwide Ins. Co.*, 724 F.2d 419 (4th Cir. 1984), the majority below has exacerbated an existing conflict among the circuits over whether the Fair Housing Act ("FHA"), 42 U.S.C. §§ 3601 *et seq.*, applies to the business of insurance. This irreconcilable and deepening conflict confronts amici's members with extraordinary uncertainty over whether they are subject to the regulatory powers of the federal government under the FHA, whether the regulatory framework of the several states remains intact or instead has been altered by federal regulation under the Act, and what legal standards will be applied to determine an insurer's potential liability in connection with its homeowners' insurance products, prices, and practices.

Amici are uniquely situated to assess the practical implications of the Sixth Circuit's rulings in this case, and the need for resolution of the conflicts deepened by the decision below. In particular, amici can highlight for the Court the impact federal regulation of insurance under the standards of the FHA will have on the neutral underwriting and rating rules and standards that have been the hallmark of state regulation for many years. An appreciation of such consequences is critical to a proper determination of whether federal regulation will "invalidate, impair, or supersede" state regulation, and thus whether the McCarran-Ferguson Act precludes a construction of the FHA to cover the business of insurance. 15 U.S.C. § 1012(b).

Accordingly, NAMIC and AIA respectfully request that the Court grant this motion for leave to file the attached brief amici curiae.

Respectfully submitted,

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BRIEF AMICI CURIAE FOR THE NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES AND THE AMERICAN INSURANCE ASSOCIATION IN SUPPORT OF THE PETITION

STATEMENT OF INTEREST OF AMICI CURIAE

Founded a century ago, the National Association of Mutual Insurance Companies ("NAMIC") has over 1200 member insurance companies underwriting all lines of insurance, including homeowners' insurance. NAMIC's membership represents the full spectrum of property and casualty insurance companies, from large insurers with a

national presence, to regional and mid-sized companies, to farm mutuals and niche insurers. NAMIC's members account for nearly 30 percent of all direct written property and casualty insurance premiums in the United States. NAMIC's purposes are to promote a financially stable and competitive private insurance industry, and to benefit member companies through government relations, educational services, and insurance and employee benefit programs.

AIA is a national trade organization representing more than 260 companies writing property and casualty insurance in every state and jurisdiction of the United States. These companies provide 27 percent of all property and casualty insurance underwritten in the United States, and write more than 14 percent of the total homeowners' insurance premiums written nationwide. AIA companies are affiliated with independent insurance agents throughout the country. AIA's purposes are to promote the economic, legislative and public standing of its members and the insurance industry; to provide a forum for discussion of problems which are of common concern to its members; to keep members informed of regulatory and legislative developments; and to serve the public interest through appropriate activities including the promotion of safety and security of persons and property.

By siding with the Seventh Circuit's decision in *NAACP* v. *American Family Mutual Ins. Co.*, 978 F.2d 287 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 2335 (1993), and expressly rejecting the Fourth Circuit's decision in *Mackey* v. *Nationwide Ins. Co.*, 724 F.2d 419 (4th Cir. 1984), the majority below has exacerbated an existing conflict among the circuits over whether the Fair Housing Act ("FHA"), 42 U.S.C. §§ 3601 *et seq.*, applies to the business of insurance. This irreconcilable and deepening conflict confronts amici's members with extraordinary uncertainty over whether they are subject to the regulatory powers of the federal government under the FHA, whether

the regulatory framework of the several states remains intact or instead has been altered by federal regulation under the Act, and what legal standards will be applied to determine an insurer's potential liability in connection with its homeowners' insurance products, prices, and practices.

Amici and their member companies are firmly committed to the principle that homeowners' insurance should never be denied on the basis of race or any other unfairly discriminatory factor. This case, however, is not about the indisputable merit of that principle, but rather whether Congress intended that the FHA apply to the business of property insurance in the first instance, and whether such a construction of the Act invalidates, impairs, or supersedes state insurance law and is therefore prohibited by the McCarran-Ferguson Act, 15 U.S.C. § 1012(b) (the "McCarran Act").

In answering that latter question, the majority below exacerbated yet another conflict among the federal courts, one with ramifications beyond the confines of the FHA. Rather than construing the "invalidate, impair, or supersede" language of the McCarran Act according to its natural meaning, the majority below viewed the issue before it as one of "inverse preemption." Under that framework, the court asked not whether the application of federal law would "invalidate, impair, or supersede" state law, but whether federal law directly conflicted with state law. The majority below then concluded that the availability of additional and broader remedies under the FHA for racial discrimination did not conflict with the provisions of state insurance law that also prohibit such conduct, and that the McCarran Act therefore did not preclude applying the FHA to insurers. The question whether additional and broader remedies under federal law can operate to "invalidate, impair, or supersede" state law under the McCarran Act has generated confusion and uncertainty among the lower courts. Amici and their members have a keen interest in the resolution of this

conflict over a central issue affecting the regulatory authority of state and federal officials.

SUMMARY OF ARGUMENT

This case presents the Court with a unique opportunity to resolve existing conflicts and confusion in the interpretation and application of both the FHA and the McCarran Act, and in doing so to provide much needed certainty to insurers and state insurance regulators alike. The McCarran Act, enacted by Congress in response to this Court's decision in *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), established the primacy of the states in the regulation of the business of insurance. Section 2(b) of the Act provides, in relevant part: "No Act of Congress shall be construed to *invalidate, impair, or supersede* any law enacted by any State for the purpose of regulating the business of insurance * * * unless such Act specifically relates to the business of insurance." 15 U.S.C. § 1012(b) (emphasis added). The majority below committed two basic errors in deciding that the McCarran Act did not prevent it from construing the FHA to reach the business of insurance.[1]

First, the court below did not accord the language of the McCarran Act its natural meaning, or even begin its analysis with the language of the statute. Instead, following the lead of the Seventh Circuit in *American Family*, the majority below viewed the issue before it under the

[1] We will not repeat here the compelling arguments against applying the FHA to insurance in the first place, quite apart from any consideration of the McCarran Act. Those arguments are fully set forth in the petition (Pet. 6-13) and in Judge Haynesworth's opinion for the Fourth Circuit in *Mackey* v. *Nationwide Ins. Co.*, 724 F.2d at 423-425. Our focus is instead on whether such a construction is precluded by the McCarran Act because federal regulation of property insurers under the FHA would "invalidate, impair, or supersede" the extensive state regulation of such insurers.

McCarran Act as one of "inverse preemption." The court did not ask whether application of the broader remedies of the FHA would "invalidate, impair, or supersede" the Ohio regulatory regime, but instead whether the FHA directly conflicted with Ohio law. *See* Pet. App. 26-27.

This erroneous analytic approach led the majority below to the mistaken conclusion that the availability of additional, broader remedies under the FHA did not interfere with state insurance law in contravention of the McCarran Act. But in fact the different remedies available under the FHA will interfere with Ohio insurance law by encouraging Ohio citizens with complaints to bypass state administrative processes. This will have an adverse effect not only on those processes but also on the ability of state regulators to apply their experience and expertise to the insurance issues implicated by the complaints.

The consequences of the court's flawed approach, however, are not limited to the FHA. The question of the proper scope of the "invalidate, impair, or supersede" language of the McCarran Act arises repeatedly in a wide variety of settings, and there is a compelling need for a uniform understanding of how that language is to be applied. The lower courts, however, are divided on the question whether additional, broader remedies under federal law can "invalidate, impair, or supersede" state law under the McCarran Act. This Court should grant review to resolve this deepening split over a basic question in the interpretation of the McCarran Act.

Second, the majority below erred in assessing the extent to which application of liability standards under the FHA to insurers will interfere with Ohio's regulatory regime. The relief sought by federal enforcement agencies in FHA cases directly intrudes upon state regulation of insurance pricing, and the application of disparate impact analysis under the FHA to the business of insurance will undermine state regulatory guidelines grounded on the impor-

tance of neutral underwriting and rating principles. Basic uncertainty over whether federal or state standards apply, and how they are to be reconciled, is the practical consequence for insurers and regulators of the conflicts among the circuits exacerbated by the split decision below. This Court should grant the petition to resolve that uncertainty and confusion.

ARGUMENT

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT OVER WHETHER THE AVAILABILITY OF ADDITIONAL REMEDIES UNDER FEDERAL LAW OPERATES TO "INVALIDATE, IMPAIR, OR SUPERSEDE" STATE INSURANCE LAW

The court below erroneously concluded that the availability under the FHA of private civil actions—with access to jury trials, unlimited punitive damages, and attorneys fees—does not cause the Act to "invalidate, impair, or supersede" Ohio insurance law, which affords only administrative remedies. Pet. App. 26-27. The court arrived at this conclusion not by beginning its analysis with the language of the McCarran Act[2]—the proper

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[2] The McCarran Act, as codified at Title 15 of the United States Code, provides in pertinent part:

> Section 1011. The Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.
>
> Section 1012. (a) State regulation. The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> (b) Federal regulation. No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance.

starting point in a case of statutory interpretation, *see Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U.S. 205, 210 (1979) ("the starting point in a case involving construction of the McCarran-Ferguson Act, like the starting point in any case involving the meaning of a statute, is the language of the statute itself")—but instead via a circuitous route: Relying on the Seventh Circuit's decision in *American Family*, the court below first analogized the effect of the McCarran Act on other federal statutes to the effect of federal law on state law under the Supremacy Clause. As the court saw it, " '[t]he McCarran-Ferguson Act is a form of inverse preemption, so principles defining when state remedies conflict with (and so are preempted by) federal law are pertinent in deciding when federal rules "invalidate, impair, or supersede" state rules.' " Pet. App. 27 (quoting *American Family*, 978 F.2d at 296).[3]

The "inverse preemption" model announced by the Seventh Circuit in *American Family* and adopted by the majority below is fundamentally flawed. The question whether federal law preempts state law is asked against the background of a federal system in which the Federal Government is one of limited and defined powers and there is a "strong presumption" against preemption and in favor of the application of state law. *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 523 (1992). *See, e.g., Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724, 740

[3] In *American Family*, the Seventh Circuit—applying this "inverse preemption" model—reasoned that application of the FHA to Wisconsin property insurers was precluded by the McCarran Act only if the FHA "conflicts" with Wisconsin insurance law. 978 F.2d at 295. The court concluded that "state and federal rules that are substantively identical but differ in penalty do not conflict with or displace each other." *Id.* at 297. Concluding that both the FHA and Wisconsin insurance law prohibit disparate treatment and differ only in the remedies available for such conduct, the court found that application of the FHA to property insurers was not precluded by the McCarran Act.

(1985); *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522 (1981). Against such a background, preemption is found only if Congress expressly provides that state law is displaced or if state law "actually conflicts with federal law." *Cipollone*, 505 U.S. at 516.

Viewing the question under the McCarran Act as one of "inverse" preemption improperly incorporates a similar presumption into the statutory analysis. There is, however, no presumption in favor of the application of generic federal law to the business of insurance. If anything, the presumption is against any such application of federal laws that do not specifically mention insurance. That is, after all, the fair and natural reading of the McCarran Act. *See Ambrose* v. *Blue Cross & Blue Shield of Virginia, Inc.*, 891 F. Supp. 1153, 1167 (E.D. Va. 1995) ("Forcing the McCarran-Ferguson Act analysis into the preemption model distorts the analysis required by the statutory test fixed by the McCarran-Ferguson Act").

As this Court recently emphasized, Congress' purpose in enacting the McCarran Act was "*broadly* to give support to the existing and future state systems for regulating and taxing the business of insurance," by removing obstructions to the states' exercise of power that "might be thought to flow from [Congress'] own power, whether dormant *or exercised*." *United States Dept. of Treasury* v. *Fabe*, 113 S. Ct. 2202, 2207 (1993) (emphasis added). The design was not, as is generally true in the federal system, one of parallel and overlapping regulation, but instead one in which Congress intended to ensure "the continued supremacy of the States" with respect to insurance regulation, *SEC* v. *National Securities, Inc.*, 393 U.S. 453, 459 (1969), and "to reserve to the States the regulation of the 'business of insurance.'" *FMC Corp.* v. *Holliday*, 498 U.S. 52, 63 (1990). *See generally Western & Southern Life Ins. Co.* v. *State Board of Equalization*, 451 U.S. 648, 652-655 (1981). The pre-

emption model on which both the Sixth and Seventh Circuits relied ignores the significantly broader deference to state regulation required under the McCarran Act, and is therefore inappropriate for McCarran Act analysis.

The "inverse preemption" model embraced by the Seventh Circuit in *American Family* and the court below led those courts to ask whether the FHA directly conflicted with state insurance law. The McCarran Act does not, by its terms, require such a direct "conflict" to preclude the application of federal law. Rather, it requires a determination whether the application of federal law will "invalidate, impair, or supersede" state insurance laws. The Act does not define the words "invalidate, impair, or supersede." "When terms used in a statute are undefined, we give them their ordinary meaning." *Asgrow Seed Co.* v. *Winterboer,* 115 S. Ct. 788, 793 (1995); *see FDIC* v. *Meyer,* 114 S. Ct. 996, 1001-02 (1994). The word "invalidate" means "to weaken or make valueless." Webster's Third New International Dictionary 1188 (1986). "Impair" is defined as "to make worse; diminish in quality, value, excellence, or strength; do harm to." *Id.* at 1131. And "supersede" means "to make obsolete, inferior, or outmoded, * * * to make void * * * to make superfluous or unnecessary." *Id.* at 2295. These words—particularly used in conjunction—make it clear that Congress did not require the sort of actual conflict necessary for a finding of preemption under the Supremacy Clause before a determination that the McCarran Act precludes the application to the business of insurance of a federal statute that does not specifically relate to that business.

The "inverse preemption" model led the majority below—following the Seventh Circuit in *American Family* —to conclude that the availability of additional and markedly stronger remedies under the FHA did not conflict with state insurance law, and that therefore the FHA could be construed to apply to the business of insurance. When the McCarran Act's broad prohibition on construc-

tions of federal law that "invalidate, impair, or supersede" state insurance law is read according to its natural meaning, however, rather than filtered through the "inverse preemption" test, it is clear that there can be no blanket rule that additional federal remedies can never satisfy the statutory language. *See Ambrose*, 891 F. Supp. at 1166. Rather, the language of the Act requires that a court consider the actual effect of the federal law on the state regulatory regime. *Id.*

Here the availability of additional and broader remedies under the FHA—private causes of action, jury trials, unlimited punitive damages, and attorneys fees—will "weaken," "do harm to," and "make superfluous or unnecessary" Ohio insurance law, which affords relief through administrative procedures designed to allow regulatory consideration of all pertinent factors, including state interests in insurer solvency and fair access to sound insurance products. *See* Pet. 20-21. The availability of additional different remedies under the FHA—through procedures that do not ensure consideration of state regulatory interests—will encourage Ohio citizens to bypass the administrative forum provided by Ohio law, thereby displacing expert and experienced state regulators and depriving both insurers and insureds of the technical expertise of the state officials and the flexibility afforded by the administrative process. As one court recently explained:

> Virtually any state statute includes more than a simple proscription of conduct. It includes the appropriate penalty for that conduct and the appropriate mechanism for enforcing the proscription. A state law that prohibits an act, punishes it with a specific range of fines, makes it the subject of remedial action, and vests enforcement in a state quasi-judicial entity cannot be said to be consistent with a federal law that prohibits the same act, permits treble damages, fees, and costs, and expressly creates a personal cause of action. [*Ambrose* v. *Blue Cross & Blue Shield of Virginia, Inc.*, 891 F. Supp. at 1167.]

The notion that the availability of different remedies under federal law cannot "invalidate, impair, or supersede" state insurance regulation is untenable as a matter of logic. Assume both federal and state law make it illegal to operate a store after 9:00 p.m. The federal remedy is forfeiture of the business; the state remedy is a hearing before a state official who can issue a warning or a $100 fine. The federal remedy plainly "impair[s]" the state remedy, not only by imposing a greater penalty but by dispensing with the hearing at which the state official could, for example, decide only to issue a warning in light of the desirability of maintaining stores in a particular neighborhood. *See Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 386 (1992) (finding "inconsisten[cy]" between state and federal law in part because state law "imposes greater liability").[4]

The question whether additional remedies under federal law can operate to "invalidate, impair, or supersede" state insurance law has significance far beyond the FHA context in which it arose in this case, and has generated a growing conflict among the lower courts. For example, numerous courts around the country have held that the McCarran Act precludes construing the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68 ("RICO"), to apply to the business of insurance.[5]

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[4] This Court has recognized in other contexts the desirability of having complex regulatory issues decided in the first instance by expert administrators operating pursuant to flexible procedures. *See, e.g., United States* v. *Western Pac. R.R. Co.*, 352 U.S. 59, 63-65 (1956) (discussing the desirable "uniformity and consistency in the regulation of business" that results from permitting a specialized agency to resolve issues within its "special competence").

[5] *See, e.g., Ambrose* v. *Blue Cross & Blue Shield of Virginia, Inc.*, 891 F. Supp. 1153 (E.D. Va. 1995); *Everson* v. *Blue Cross & Blue Shield of Ohio*, 898 F. Supp. 532, 544 (N.D. Ohio 1994); *Forsyth* v. *Humana, Inc.*, 827 F. Supp. 1498, 1521-22 (D. Nev. 1993); *Wexco, Inc.* v. *IMC, Inc.*, 820 F. Supp. 194, 204 (M.D. Pa. 1993); *LeDuc* v. *Kentucky Central Life Ins. Co.*, 814 F. Supp. 820, 829 (N.D. Cal. 1992); *Senich* v. *Transamerica Premier Ins. Co.*, 766 F. Supp. 339, 341 (W.D. Pa. 1990).

Those courts have reasoned—in conflict with the approach of the majority below—that the prospect of private causes of action for treble damages and attorneys fees under RICO would "invalidate, impair, or supersede" state insurance law, even though both RICO and state insurance law prohibit the same conduct. Indeed, less than six months after issuing its opinion in this case, the Sixth Circuit reached the same result in *Kenty* v. *Bank One*, 67 F.3d 1257 (6th Cir. 1995), *reh'g granted* (Nov. 28, 1995), holding that application of RICO to alleged fraudulent conduct by an insurer would "invalidate, impair, or supersede" Ohio insurance law and is therefore precluded by the McCarran Act. *Id.* at 1264-67.[6]

Kenty and the numerous other decisions to like effect conflict with the recent decision of the Ninth Circuit in *Merchants Home Delivery Serv., Inc.* v. *Frank B. Hall & Co.*, 50 F.3d 1486 (9th Cir.), *cert. denied*, 116 S. Ct. 418 (1995). In that case, the insurer argued that the application of RICO to its alleged fraudulent conduct would invalidate, impair, or supersede state insurance regulations because "the private right of action for treble damages and mandatory attorneys fees allowed by RICO would upset the balance struck by California's insurance code, which, in general, allows only administrative enforcement and actual damages." *Id.* at 1491. The Ninth Circuit, relying heavily on the Seventh Circuit's "inverse preemption" analysis in *American Family*, rejected this argument and held "that the application of a federal statute prohibiting acts which are also prohibited under a state's insurance laws does not 'invalidate, impair, or supersede' the state's laws under § 2(b) of the McCarran-Ferguson Act." *Id.* at 1492. This Court should grant certiorari to resolve the growing conflict over whether additional and stronger remedies under federal law trigger

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[6] The *Kenty* court has granted a petition for rehearing, but not on the McCarran Act issue. *See* Petition for Rehearing of Appellee-Petitioner Bank One, Columbus, N.A. (6th Cir. No. 93-4211, filed Nov. 8, 1995).

the McCarran Act because they operate to "invalidate, impair, or supersede" state insurance law.

II. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT OVER WHETHER APPLYING LIABILITY STANDARDS UNDER THE FAIR HOUSING ACT TO THE BUSINESS OF INSURANCE WOULD "INVALIDATE, IMPAIR, OR SUPERSEDE" STATE INSURANCE LAW

The availability of different and broader remedies under the FHA—remedies divorced from the supervision and control of state regulatory officials—suffices to establish that application of the FHA to the business of insurance will operate to "invalidate, impair, or supersede" the state regulatory regime. Consideration of *how* the FHA will be applied to insurance practices simply confirms that conclusion.[7]

There is no question that application of the FHA to property insurance will impact state regulation of insurance pricing. Indeed, both the Sixth and Seventh Circuits have defined "redlining" to encompass the rates charged for insurance. *See* Pet. App. 3; *American Family*, 978 F.2d at 290. The widely-publicized consent decree entered in the *American Family* case has placed insurers on notice that federal enforcement agencies are seeking and obtaining relief in FHA cases that effectively sets homeowners' insurance premium rates and establishes basic underwriting standards without regard to active state supervision of insurance pricing and underwriting rules. *See* App., *infra*, at 1a-5a.[8] Direct federal regulation

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[7] We believe that application of the FHA to insurance would intrude upon state regulation to such an extent as to constitute a direct conflict of the sort apparently required under the lower court's misguided "inverse preemption" test. The level of inevitable disruption certainly meets the "invalidate, impair, or supersede" test established by the McCarran Act itself.

[8] In addition, HUD has publicly solicited applications for funding for private fair housing enforcement projects based on comparisons of premiums charged and data indicating discriminatory impact of underwriting practices. *See* 59 Fed. Reg. 40757 (Aug. 9, 1994).

of insurance pricing openly intrudes upon the state insurance regulators' mission to ensure that rates are not excessive, inadequate, or unfairly discriminatory, matters which are quintessentially within the province of the states and properly confided to the insurance regulators' expertise.[9]

The FHA's interference with state regulation of insurance pricing and underwriting is especially pronounced under a disparate impact liability standard. The practical effect of the Sixth Circuit's decision is that property insurers will be forced to fend off FHA disparate impact challenges to underwriting and rating standards and rules sanctioned by state insurance regulators. HUD has actively advocated a disparate impact standard for FHA claims generally, and has issued a regulation providing that the FHA applies to property insurance. While this Court has yet to decide whether disparate impact liability applies under the FHA, nine of the federal circuits—including the Sixth Circuit—have held that, at least in some circumstances, a claim under the FHA can be established by proof of disparate impact alone.[10] These facts have al-

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[9] *See, e.g., Farmers Ins. Exch.* v. *Superior Court*, 2 Cal. 4th 377, 398, 6 Cal. Rptr. 2d 487, 500-501, 826 P.2d 730, 742-743 (1992); *Attorney General* v. *Insurance Commissioner*, 323 N.W.2d 645, 649 (Mich. Ct. App. 1982) (insurance rate-making is "a technical and highly complex process requiring much expertise"); *Pennsylvania Ins. Dept.* v. *Johnson*, 238 A.2d 23, 25-26 (Pa. Super. 1967) ("Insurance ratemaking is a technical, complicated and involved procedure carried on by trained men.") (quotation omitted), *aff'd*, 248 A.2d 308 (Pa. 1968), *cert. denied*, 394 U.S. 1003 (1969).

[10] *See Huntington Branch, NAACP* v. *Town of Huntington*, 844 F.2d 926, 934 (2d Cir.), *review declined in relevant part*, 488 U.S. 15, 18 (1988); *Resident Advisory Bd.* v. *Rizzo*, 564 F.2d 126, 146-148 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978); *Betsey* v. *Turtle Creek Assocs.*, 736 F.2d 983, 986-988 (4th Cir. 1984); *Hanson* v. *Veterans Admin.*, 800 F.2d 1381, 1386 (5th Cir. 1986); *Arthur* v. *City of Toledo*, 782 F.2d 565, 574-575 (6th Cir. 1986); *Metropolitan Housing Dev. Corp.* v. *Village of Arlington Heights*, 558 F.2d 1283, 1289-90 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978); *United States* v. *City of Black Jack*, 508 F.2d 1179, 1184-85 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975); *Keith* v. *Volpe*,

ready precipitated and will inevitably continue to precipitate disparate impact challenges to property insurers' underwriting and rating standards.[11]

The imposition of a disparate impact standard upon property insurers under the FHA would directly conflict with the state insurance law principle requiring comparable treatment of like risks. Like many other states, Ohio prohibits insurers from engaging in unfair discrimination among like risks, but does not prohibit the use of facially neutral rates and underwriting standards that may have a disparate impact. Ohio Rev. Code § 3901.21(M) (prohibiting insurers from "making or permitting any unfair

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858 F.2d 467, 482-484 (9th Cir. 1988), *cert. denied*, 493 U.S. 813 (1989); *Mountain Side Mobile Estates Partnership* v. *Secretary of Housing and Urban Development*, 56 F.3d 1243, 1250-51 (10th Cir. 1995).

[11] The Sixth Circuit declined to reach the disparate impact issue on the ground that it was not ripe for review. Nationwide has argued in its petition that the court's refusal to address the disparate impact issue conflicts with this Court's decision in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967), and decisions from other circuits. *See* Pet. 16-19. Amici join those arguments, and emphasize the urgency to their members of having this unsettled issue resolved. For example, HUD has received and is investigating complaints against amici's members which include claims of disparate impact, and has given every indication of its intention to employ a disparate impact theory in enforcing the FHA against insurers. *See* Pet. App. 135-152. Some state insurance regulators have correctly ascertained that the "disparate impact test applied to insurance for urban dwellers seems to be a given—a foregone conclusion—to HUD." App., *infra*, at 7a (testimony of Richard C. Hsia, Deputy Superintendent of Insurance, New York State Insurance Department, before United States Department of Housing & Urban Development, at 7 (Oct. 27, 1994)).

The certworthiness of this case does not depend, however, on whether the Court elects to reach and decide the ripeness issue. As explained in the petition and this brief, there are stark conflicts among the circuits on whether the FHA applies in any form to insurance, and on whether the availability of additional federal remedies triggers the McCarran Act. Those conflicts do not depend on whether a disparate impact standard is applied to insurance under the FHA.

discrimination between individuals of the same class and of essentially the same hazard in the amount of premium, policy fees, assessments, or rates charged for any policy or contract of insurance * * * or in underwriting standards and practices or eligibility requirements"). By no means does state law permit race to be used as a basis for these risk classifications. Rather, the classifications focus on the condition of the structure to be insured and rating territory, and must have a meaningful actuarial basis linked to loss experience or other legitimate support; these standards and groupings are submitted to and subject to approval by state insurance regulators. *See, e.g., id.* §§ 3935.03-.05.

The FHA disparate impact standard and state law unfair discrimination standards serve different and not necessarily compatible or consistent ends. Underwriting standards and rates which are proper under the state unfair discrimination standard because they are actuarially sound, risk-related, and justified on the basis of loss experience—and in no way reflect an intent to discriminate on the basis of a prohibited factor—may nevertheless have a disparate impact and thus fail to pass muster under the FHA, absent a sufficient showing of business necessity. For example, higher rates for older homes or urban areas may be approved by a state insurance commissioner, based on the higher loss costs for such homes or areas. Nonetheless, there may be a disproportionate percentage of groups protected under the FHA living in those homes or areas. A lawsuit filed under the FHA alleging that this state-approved rating practice has a disparate impact on such protected groups would plainly interfere with the state insurance regulatory regime. Potential conflicts like these recently led one state regulator to counsel HUD that "[f]or insurance purposes * * * treating everyone the same would create widespread unfair discrimination." App., *infra*, at 9a (Testimony of Richard C. Hsia, *supra*).

The specter of disparate impact challenges would act as a perverse incentive to insurers to close their eyes to

actual loss experience and spread the risk of loss attributable to identifiable classes of housing stock across all insureds. As the Seventh Circuit acknowledged, "[p]utting young and old, or city and country, into the same pool would lead to adverse selection: people knowing that the risks they face are less than the average of the pool would drop out." *American Family*, 978 F.2d at 290.

Finally, the threat of disparate impact liability would have a severe chilling effect upon underwriting judgments in other respects. The potential for disparate impact suits, where no proof of discriminatory intent is required and where inferences matter so significantly—not to mention the uncertainty of jury trials and unlimited punitive damage awards—would be sure to alter and discourage proper underwriting judgments and the application of neutral standards consistent with state unfair discrimination principles. The end result will be to "invalidate, impair, or supersede" state insurance law, in violation of the McCarran Act.

III. THE QUESTIONS PRESENTED ARE IMPORTANT AND RECURRING, AND SHOULD BE RESOLVED BY THIS COURT

There is a sharp conflict among the federal circuits over whether the FHA applies to the business of insurance. The Sixth Circuit's decision in this case and the Seventh Circuit's decision in *American Family* conflict with the Fourth Circuit's decision in *Mackey*. There can be no debate about the existence of that conflict; it has been expressly acknowledged by the courts themselves. *See, e.g., American Family*, 978 F.2d at 302 (recognizing that "this opinion * * * conflicts with * * * the Fourth Circuit's holding in *Mackey*"); Pet. App. 11-15 (rejecting reasoning of *Mackey*); *id.* at 29 (Kennedy, J., dissenting and relying on *Mackey*). This conflict over the applicability of an important federal statute should be resolved by this Court. As this Court has explained, a

"principal purpose for which we use our certiorari jurisdiction * * * is to resolve conflicts among the United States courts of appeals." *Braxton* v. *United States*, 500 U.S. 344, 347 (1991). *See* S. Ct. Rule 10.1(a).

The issue is a legal one that does not depend upon the specific facts of any particular case. The FHA should have the same scope in the Sixth and Seventh Circuits as in the Fourth, particularly since many insurers operate throughout the country. The division among the circuits is sharply defined and the competing arguments have been fully aired and considered; there is no warrant for allowing the conflict and uncertainty to persist while other circuits weigh in on the question. The hope that Congress might address and resolve the conflict—which might well explain the decision not to grant review in *American Family*, despite the expressly acknowledged conflict with *Mackey*—has not come to fruition. Instead of being resolved, the conflict has now deepened. This Court should wait no longer to resolve it.

At the same time, there is a deepening conflict among the lower courts over the broader question whether the availability of additional federal remedies can operate to "invalidate, impair, or supersede" state insurance law under the McCarran Act. Until this confusion is resolved, the circuits will continue to reach disparate results as they apply the McCarran Act to particular federal statutes, as has already happened with respect to the FHA and RICO. This case affords the Court an opportunity to clarify these important and unsettled questions of federal law. It should grant certiorari to do so.

CONCLUSION

For the foregoing reasons, and those in the petition, this Court should grant the petition and reverse the decision below.

Respectfully submitted,

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APPENDICES

APPENDICES

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

Civil Action No. 95-C-0327

UNITED STATES OF AMERICA,
Plaintiff,

v.

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,
Defendant.

Civil Action No. 90-C-0759

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, [NAACP], *et al.*,
Plaintiffs,

v.

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,
Defendant.

CONSENT DECREE

* * *

II. AMERICAN FAMILY'S HOMEOWNERS INSURANCE INITIATIVES

A. Injunctive Relief

American Family, its officials, employees, sales agents, and through them, their employees, and successors are

enjoined from engaging in any act or practice that unlawfully discriminates by intent or effect on the basis of race or color in the provision of homeowners insurance, imposing on the basis of race different terms or conditions for the availability of homeowners insurance, or making any statement that indicates any preference, limitation, or discrimination based on race or color.

* * *

C. Marketing

* * *

3. *Policy offerings*

American Family will make the following policy offerings in Milwaukee County:

(a) American Family has introduced and will maintain a new homeowners insurance product known as a Custom Value replacement cost homeowners policy and will make modifications to the eligibility guidelines for several existing insurance products, as described below.

(b) American Family has decided to and will eliminate its requirement that the market value of a home must be eighty (80) percent or more of the estimated replacement cost to obtain a homeowners insurance policy which provides replacement cost coverage.

i. A homeowner can obtain a Custom Value replacement cost homeowners policy if the market value of the home is ten (10) percent or greater and less than eighty (80) percent of the replacement cost and the amount of insurance purchased is less than eighty (80) percent of the replacement cost of the dwelling. Under this policy American Family will not prorate the payment of any claims up to the policy limits. These

Custom Value policies will be identical to American Family's HO-1 and HO-3 policies in coverages, terms, and conditions, except as to the differences in coverage amounts described above.

ii. A homeowner can obtain a Custom Value homeowners insurance policy in any coverage amount from ten (10) to seventy-nine (79) percent of the home's estimated replacement cost if the market value of the home to be insured is between forty (40) and seventy-nine (79) percent of its estimated replacement cost. A homeowner can obtain a Custom Value policy in any coverage amount up to one and a half times the market value of the home if the market value of the home to be insured is less than forty percent of the home's estimated replacement cost.

iii. A homeowner can obtain a standard replacement Form 1, 2, or 3 homeowners policy if the market value of the home is at least forty (40) percent of the replacement cost and the amount of insurance purchased is at least eighty (80) percent of the replacement cost.

iv. A homeowner can obtain a Gold Star replacement cost homeowners policy if the market value of the home is at least fifty (50) percent of the replacement cost and the amount of insurance purchased is at least one hundred (100) percent of the replacement cost. American Family will also require that homes covered by a Gold Star policy meet those specified objective standards directly related to a reduction in the risk of loss or damage to the home.

(c) American Family has decided to and will eliminate the requirement that a property must be of a certain minimum value and that a potential insured must purchase a minimum amount of homeowners insurance. A minimum basic premium of eighty-eight ($88.00) dollars for a home in the City of Milwaukee with masonry construction and ninety-five ($95.00) dollars for a home with frame construction will be charged to cover administrative, loss, and processing costs. For the year ending March 31, 1996, the minimum basic premium amount will provide a maximum of twenty thousand dollars ($20,000) of insurance coverage, with a two hundred and fifty dollar ($250.00) deductible. American Family may adjust the minimum premium by the same percentage as the percentage of adjustment approved by the Wisconsin Office of the Commissioner for Insurance for American Family Form 3 replacement cost homeowners insurance policy.

(d) American Family has decided that the premium for the Custom Value coverage will be calculated by multiplying a factor for the percentage the requested amount of coverage is of the home's estimated replacement cost by the premium American Family charges for Form 3 coverage at the full replacement cost. A minimum basic premium of eighty-eight ($88.00) dollars for a home in the City of Milwaukee with masonry construction and ninety-five ($95.00) dollars for a home with frame construction will be charged to cover administrative, loss, and processing costs. American Family may adjust the minimum premium by the same percentage as the percentage of adjustment approved by the Wisconsin Office of the Commissioner for Insurance for American Family Custom value Form 3 replacement cost homeowners insurance policy.

* * *

D. Underwriting

* * *

4. American Family will disseminate these revised underwriting guidelines to its sales agents, underwriters, and other appropriate employees within ninety (90) days following the entry of this Order. The revised underwriting guidelines will provide that:

* * *

(b) The decision on the eligibility of a home for insurance, and the decision as to the type of policy that will be issued, will be based on the individual characteristics of the home. American Family agrees not to take into consideration the condition or other characteristics of the homes in the surrounding neighborhood and may take into consideration the condition of an adjacent home only if it presents an identifiable risk to the home for which insurance is sought. For example, American Family agrees the mere fact that an adjacent home is not itself in insurable condition may not be a basis for declining insurance.

* * *

APPENDIX B

NEW YORK STATE
INSURANCE DEPARTMENT

TESTIMONY

BY

RICHARD C. HSIA
DEPUTY SUPERINTENDENT OF INSURANCE

ON BEHALF OF

SALVATORE R. CURIALE
SUPERINTENDENT OF INSURANCE
ON

FAIR HOUSING & FAIR INSURANCE

SOUND HOUSING & SOUND INSURANCE

BEFORE

UNITED STATES DEPARTMENT
OF
HOUSING & URBAN DEVELOPMENT

HON. HENRY CISNEROS
HUD SECRETARY

HON. ROBERTA ACHTENBERG
HUD ASSISTANT SECRETARY
FOR
FAIR HOUSING & EQUAL OPPORTUNITY

FANEUIL HALL
BOSTON, MASSACHUSETTS
OCTOBER 27, 1994

* * *

FAIR HOUSING & FAIR INSURANCE

SOUND HOUSING & SOUND INSURANCE

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* * *

H. Divergence (?) Between Unfair Discrimination & Disparate Impact.

The disparate impact test (DIT) applied to insurance for urban dwellers seems to be a given—a foregone conclusion—to HUD. No practical obstacle might be presented, if disparate impact under HUD's interpretation of the federal Fair Housing Act closely corresponds to what would constitute unfair discrimination under governing state insurance statutory and regulatory standards. How would DIT work, as applied to insurance? If applied to insurance, would DIT prove workable?

Problems surely arise in the event of divergence between these two concepts. Are they compatible or in conflict? Under disparate impact analysis, to what extent, if at all, would otherwise lawful insurer practices become unlawful? Suppose an underwriting guideline was, indisputably, both risk-related and causally-connected. Despite these qualities of sound underwriting, could it be nevertheless thrown into question or struck down due to disparate impact? Will disparate impact bar behavior that is not unfair discrimination?

At this stage, unsure of correct answers, we merely pose a series of pertinent questions:

*** Would DIT permit or promote sound underwriting?

*** Will DIT proscribe factors, even if risk-related?

*** Will DIT proscribe factors, even if causally-connected?

*** Do loss probabilities or actuarial projections matter under DIT?

*** Does use of rating territories comport with DIT?

*** Do higher urban insurance rates fail DIT?

*** Do higher urban residual market proportions fail DIT?

*** Will DIT admit the need for special expertise in urban markets?

*** Will DIT rule out prudent underwriting practices?

*** Will DIT overrule prudent financial management?

*** Does DIT trigger due to disparities in agents per capita ratios?

*** Will DIT forbid regional, specialty or niche writers?

*** Would DIT have disparate impact on competition?

*** Does DIT preclude insurer diversification?

*** Will DIT recognize concentration of risk concerns?

*** Will DIT override capacity constraints & insurer compliance?

We look, and listen, to HUD for the answers to these questions. It will be of comfort to know that the answers to these questions are all no. In any event, we need to know if yes, or even maybe, is the answer to any of these questions. Some queries may not lend themselves to a yes or no response.

Still more questions should be asked and answered. Do business necessity under DIT and proper business purpose in insurance terms mean the same? Insofar as DIT con-

templates shifting burdens of proof, how heavy are those burdens and how can they be lifted or carried? What if the practice in question has a disparate impact but also a reasonable economic basis?

If disparate impact in some ways amounts to a sterner test than unfair discrimination, will it yield better results? Will DIT impair or impinge upon state insurance regulation?

Most important, perhaps, will risk factors relevant to insurance be equalized or ignored under a disparate impact test? Most pointedly, will disparate impact, if and when applied to insurance in view of fair housing goals, fairly take disparate housing conditions into account?

Ultimately, how can disparate impact analyses work in the context of insurance, which, properly understood in nature and properly functioning, is all about differential treatment? For insurance purposes, it must be appreciated that treating everyone the same would create widespread unfair discrimination.

* * *

Supreme Court, U.S.
FILED
JAN 16 1996
CLERK

No. 95-714

In The

Supreme Court of the United States

October Term, 1995

NATIONWIDE MUTUAL INSURANCE COMPANY and NATIONWIDE MUTUAL FIRE INSURANCE COMPANY,

Petitioners,

v.

HENRY CISNEROS, Secretary of the United States Department of Housing & Urban Development; JERALD L. STEED, Executive Director, Dayton Human Relations Council; CHARLES W. BROWN, Chairperson, Dayton Human Relations Council; and CITY OF DAYTON,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITIONERS' REPLY MEMORANDUM

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PETITIONERS' REPLY MEMORANDUM

1. The questions presented by this petition – whether the Fair Housing Act regulates the provision of property insurance, whether the interpretive regulation of the United States Department of Housing & Urban Development ("HUD") is entitled to substantial deference on this pure question of statutory construction, whether there should be pre-enforcement judicial review of HUD's definitive intention to engage in disparate impact regulation of the day-to-day business of property insurance, and whether the existence of additional remedies under the Fair Housing Act invalidates, impairs or supersedes state insurance law in contravention of the McCarran Act – are of fundamental importance "to the property insurance industry, homeowners and prospective homeowners, state insurance commissions and numerous civil rights organizations." Pet. at 7. That point is underscored by the *amicus curiae* briefs filed in support of Nationwide's petition.[1] Insurance industry groups have asked this Court to end the "continued" and "extraordinary uncertainty" (NAII Br. at 2 and NAMIC Br. at 2) "over whether they are subject to the regulatory powers of the federal government" and "whether the regulatory framework of the several states remains intact." NAMIC Br. at 3.

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[1] Briefs have been filed on behalf of the property insurance industry by the National Association of Independent Insurers ("NAII"), American Insurance Association ("AIA") and National Association of Mutual Insurance Companies ("NAMIC"); on behalf of state insurance commissioners by the National Association of Insurance Commissioners ("NAIC"); and on behalf of insurance consumers by the Washington Legal Foundation ("WLF").

State insurance regulators have asked this Court to affirm that "rationally based, neutral risk selection criteria" still apply to preserve "insurer solvency, in the best interests of policyholders and claimants." NAIC Br. at 2. The Washington Legal Foundation, too, has raised concerns that additional federal disparate impact regulation will distort "the market for insurance products" and harm "insurance consumers." WLF Br. at 3. HUD does not deny the national importance of the questions raised by Nationwide's petition and the *amici*. Nor does HUD deny that those questions continue to be the subject of unresolved debate and controversy among HUD, the insurance industry and state regulators. Pet. at 9-11.[2]

2. HUD errs in asserting that there is no conflict between the decision below and the Fourth Circuit's decision in *Mackey v. Nationwide Ins. Cos.*, 724 F.2d 419 (4th Cir. 1984), over the question of whether the Fair Housing Act applies to insurance. Brief in Opp. at 12 n. 2. While HUD acknowledges that there is "some tension" between the two decisions (and between *Mackey* and the Seventh Circuit's decision in *NAACP v. American Family Mutual Ins. Co.*, 978 F.2d 287 (7th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 2335 (1993)), HUD contends that there is no true conflict because *Mackey* was decided before HUD

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[2] The Dayton Respondents have filed an appearance in which they concur in the position taken by HUD. This reply, therefore, will simply refer to "HUD" in addressing Respondents' position.

issued its intervening rules. Brief in Opp. at 12 n. 2.[3] This argument is specious. The differing outcomes in these cases cannot be explained as simple deference to HUD's views. To the contrary, the decision below, in determining "whether the text of the Fair Housing Act addresses the precise issue in this case" (Pet. App. at 9), was squarely at odds with *Mackey* over the following issues of statutory construction: (1) the significance of the lack of any reference to insurance in the Act; (2) the proper conclusion to be drawn from canons of statutory construction; (3) the weight to be placed upon silence in the legislative history, especially in light of the backdrop of the McCarran-Ferguson Act and the different approach embodied by the Urban Property Protection and Reinsurance Act ("UPPRA") enacted in the same year; and (4) Congress' numerous unsuccessful attempts to extend the Act to include insurance. Pet. App. at 10-15. *American Family*, too, disagreed with the reasoning and analysis employed by the Fourth Circuit in *Mackey*. *See American Family*, 978 F.2d at 297-301 (court criticizes merits of

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[3] HUD's characterization of its 1989 regulations as "legislative rules" is simply mistaken. Congress' enactment of a statute conferring upon HUD general authority to "make rules . . . to carry out" the Act (42 U.S.C. § 3614a) does not constitute a legislative delegation for HUD to define the scope of its own jurisdiction. *See e.g., American Federation of Labor, AFL-CIO v. Donovan*, 757 F.2d 330, 342 (D.C. Cir. 1985) (general delegation of authority to the Secretary of Labor to "make . . . rules and regulations necessary to carry out" a federal statute did not "entitle [ ] the Secretary to characterize as legislative rules his interpretation of the congressionally delineated scope of the Act's provisions"). Rather, HUD's 1989 regulations are interpretive, not legislative, rules which are not entitled to "controlling significance." *Batterton v. Francis*, 432 U.S. 416, 424 (1977).

Mackey at length and notes that it doubts "the interpretive methods used in [the *Mackey*] opinion").[4]

3. HUD's attempt to harmonize *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), with other decisions of this Court is unavailing. Brief in Opp. at 16. As HUD concedes (br. in opp. at 6-7), the panel below was split over whether *Chevron* deference applied at all to the interpretation of the Fair Housing Act. The majority applied *Chevron*, while Judge Kennedy, in dissent, relied upon *INS v. Cardoza-Fonseca*, 480 U.S. 421, 445-48 (1987), in refusing to pay deference to HUD's interpretation "[w]here this Court can ascertain Congressional intent through traditional tools of statutory construction . . . " Pet. App. at 29. That split reflects ongoing confusion in the lower courts over the proper application of principles in this area. Pet. at 13-16. Contrary to HUD's contention, *Cardoza-Fonseca* cannot be reconciled with *Chevron*. Indeed, in his concurring opinion in *Cardoza-*

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[4] HUD's response focuses primarily upon defending the merits of the decision below, rather than addressing the importance of the issues involved or the conflicts raised by the Sixth Circuit's decision. Contrary to HUD's contentions, *Mackey* and Judge Kennedy's dissenting opinion below represent the correct position on whether the Fair Housing Act can be construed to cover insurance, especially in light of the McCarran-Ferguson Act which expressly reserves to the 50 states the primary role in the regulation of insurance. Pet App. at 29 ("I do not believe that Congress would have intended to include insurance practices without at least considering the limitations imposed by the McCarran-Ferguson Act.") (Kennedy, J.) See also NAII Br. at 9-12, demonstrating how the legislative history of the Fair Housing Act renders it implausible that Congress intended, *sub silentio*, to cover the insurance industry under the aegis of 42 U.S.C. § 3604(a) and (b).

Fonseca, Justice Scalia expressed strong disapproval of Justice Stevens' majority opinion precisely because it could not be squared with the test set forth in *Chevron*. 480 U.S. at 454 ("[Justice Stevens' approach] is not an interpretation but an evisceration of *Chevron*.") Also, contrary to HUD's response, this Court did not simply reaffirm *Chevron* in *NLRB v. United Food & Commercial Workers Union*, 484 U.S. 112 (1987). Brief in Opp. at 16. Rather, Justice Brennan relied primarily upon *Cardoza-Fonseca*, not *Chevron*, in emphasizing that where there is a "pure question of statutory construction," it is the court's first job "to try to determine congressional intent." 484 U.S. at 123. The test enunciated in *Cardoza-Fonseca* and followed by Justice Brennan in *United Food & Commercial Workers* and Judge Kennedy below cannot, contrary to HUD's assertion, be reconciled with *Chevron*.

4. HUD fails to explain how the decision below rejecting Nationwide's McCarran Act challenge to the disparate impact enforcement of the Fair Housing Act can be reconciled with this Court's ripeness decision in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967). HUD contends that "[b]ecause petitioners have not identified any particular underwriting practice that they believe a disparate impact approach will prevent them from employing, petitioners' challenge presents merely an 'abstract disagreement [ ] over administrative polic[y].' " Brief in Opp., pp. 22-23 n. 4, quoting *Abbott Laboratories*, 387 U.S. at 148. HUD misstates the issue and, in any event, ignores the uncontroverted record.[5] The issue is whether Nationwide

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[5] Nationwide identified in the court below specific underwriting practices that would have to be altered to avoid the

has identified specific state insurance laws that would be "impaired, invalidated or superseded" by HUD's undisputed intention to enforce its regulations under a disparate impact approach. Nationwide identified in the court below several state insurance laws that would be impaired by HUD's application of a disparate impact approach. See Pet. App. at 20-21 outlining Nationwide's arguments for impairment of state insurance laws governing "fair discrimination" and for impairment of the Ohio FAIR Plan. *See also*, Ohio Rev. Code §§ 3901.21(M) and 3901.43. The court below, however, never reached Nationwide's arguments because, according to the court, "it is not clear that HUD will apply a disparate impact analysis to its regulation governing insurance providers in the future. . . . " Pet. App. at 26. That conclusion, as Nationwide's petition establishes and HUD does not

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threat of disparate impact enforcement. Those practices are identified in detail in affidavits submitted by Professor Spencer Kimball, Richard Stewart, the former Superintendent of Insurance for the State of New York, and Robert White, Nationwide's Vice President Personal Lines Insurance Services. Sixth Circuit Joint Appendix ("JA") at 300-339, 340-371 and 384-393. In essence, as affiant Stewart stated, the "additional level of [federal] regulation would tend to have a chilling effect upon the proper exercise of underwriting decisions. Litigation concerns are likely to result in increased administrative costs and decisions to underwrite properties in environmentally hazardous areas at rates which are not commensurate with the risk." JA at 388-389. This is contrary to the fundamental underwriting principle that like risks should be treated alike. The *amici*, too, have identified neutral underwriting practices – including consideration of the age of the house and the difference between its replacement cost and market value – which would be affected by disparate impact enforcement. See NAMIC Br. at 16-17, NAII Br. at 15, and WLF Br. at 8-9.

dispute, is belied by HUD's own numerous pronouncements that it intends to apply disparate impact analysis to insurers. Pet. at 17-18 n. 22 and 23.[6]

HUD further contends that this case is not ripe for review under *Abbott Laboratories* "because any application of disparate impact analysis to a particular underwriting practice would involve a highly fact-specific inquiry into the effects of and business justifications for that practice . . . " Brief in Opp. at 23 n. 4, citing *Gardner v. Toilet Goods Ass'n*, 387 U.S. 167 (1967). Once again, HUD misstates the issue. It is uncontroverted that the "severe chilling effect" (NAMIC Br. at 17) of the threat of disparate impact enforcement forces insurers, like Nationwide, to alter their pricing and underwriting standards with respect to any of the groups afforded protection under the Fair Housing Act (*see* 42 U.S.C. § 3604(a) and (f), forbidding discrimination on the basis of race, color, religion, sex, familial status, national origin or handicap) at substantial cost, or run the risk of prosecution by HUD and the imposition of substantial penalties if existing standards happen to disproportionately affect a protected

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[6] HUD contends that Ohio's civil rights statute "may already incorporate a prohibition on insurance practices that are discriminatory in effect." Brief in Opp. at 20-21. This does not detract from Nationwide's argument. *First*, unlike HUD, no Ohio court has stated that disparate impact analysis would be applied to insurers. *Second*, regardless of the possible enforcement of Ohio's Civil Rights Act, the McCarran Act forbids federal impairment of *state insurance laws*. HUD has not argued that Ohio insurance law prohibits neutral risk practices which have a disparate effect on those in protected groups.

group.[7] White Aff., ¶¶ 14, 18-20, JA at 305-308. This "dilemma" (*Abbott Laboratories*, 387 U.S. at 153) is not resolved by waiting for HUD or private plaintiffs to challenge those standards on a case by case basis in front of federal juries. By then, the damage has been done. This Court should take this case to affirm that *Abbott Laboratories* applies, and that, therefore, Nationwide's challenge to disparate impact enforcement of the Fair Housing Act is ripe for review.[8]

5. HUD fails to address Nationwide's final point that the decision below rejecting Nationwide's challenge to disparate treatment enforcement is contrary to the plain language of the McCarran Act. HUD contends that

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[7] The "chilling effect" follows from the fact that insurance "is unique." NAII Br. at 13. "[I]nsurers must set their prices without full knowledge of their product's cost and must project future costs by analyzing loss experience data." *Id.* at 14. This "results in the classification of like risks based on a number of objective variables" (*id.*) – a process which is distorted if full consideration of those variables is "chilled" by Fair Housing Act enforcement.

[8] HUD contends, alternatively, that Nationwide's challenge fails not because of lack of ripeness but because it constitutes a "facial challenge" to the validity of HUD's regulation. Brief in Opp., p. 20, citing *Rust v. Sullivan*, 500 U.S. 173 (1991). *Rust*, which involved a challenge to the constitutionality of regulations, is inapposite. Here, Nationwide is not mounting a facial challenge to the constitutionality of HUD's regulations, but rather is contending that *as applied* HUD's regulations will impair state insurance law within the meaning of the McCarran Act. See 15 U.S.C. § 1012(b) ("No Act of Congress *shall be construed* to invalidate, impair or supersede" state insurance law.) (emphasis added).

disparate treatment enforcement would not "create a conflict with a state statute." Brief in Opp. at 19. That is the very error of statutory interpretation committed by *American Family* and the majority panel below. Contrary to HUD's contention, the issue is not whether there is direct "conflict." Rather, the issue is whether an additional layer of federal regulation "impairs, invalidates or supersedes" state insurance law if federal law supplants the state mechanisms already in place. Nationwide demonstrated in detail in the court below how the presence of an additional layer of federal regulation will impair Ohio insurance laws which establish an administrative remedial scheme presided over by the Superintendent of Insurance. *See, e.g.*, Ohio Rev. Code §§ 3901.011, 3901.22. There will also be impairment of the Ohio FAIR Plan which was established under Ohio insurance law. Ohio Rev. Code § 3929.41, *et seq*. The issue is not, as HUD contends, whether an "Ohio statute authorizes or requires insurers intentionally to discriminate on the basis of race." Brief in Opp. at 19. Rather, it is whether the Ohio scheme for regulation of insurance embodied in the Ohio Insurance Code, which contemplates regulation by knowledgeable professional administrators, would be displaced by a federal scheme of *ad hoc* regulation by juries.

HUD asserts that "every circuit to have addressed the issue has concluded that application of the Fair Housing Act" to insurers does not violate the McCarran Act. Brief in Opp. at 17, citing *American Family*. The court in *American Family*, however, inappropriately relied by analogy upon the narrower concept of federal preemption under the Supremacy Clause, rather than upon the actual language of the McCarran Act. As the *amicus curiae* brief

of NAMIC and AIA demonstrates in greater detail, there is a growing conflict among the lower courts over whether the *American Family* "inverse preemption" approach to interpretation of the McCarran Act is correct. NAMIC Br. at 11-12, citing, in particular, conflict between *Kenty v. Bank One*, 67 F.3d 1257 (6th Cir. 1995) and *Merchants Home Delivery Serv., Inc. v. Frank B. Hall & Co.*, 50 F.3d 1486 (9th Cir.), *cert. denied*, 116 S.Ct. 418 (1995), over the application of RICO to alleged fraudulent conduct of insurers in light of the dictates of the McCarran Act. That conflict stems from the erroneous "inverse preemption" analysis utilized in *American Family* and followed by the majority below. This case is an appropriate vehicle both to resolve the conflict in the lower courts and to rectify a serious error in the interpretation of an important federal statute.

Respectfully submitted,

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